Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Cole and Department of State Development, Infrastructure and Planning (Office of Industrial Relations); & Ors*** **[2024] QICmr 67 (26 November 2024)**
Application Number:	**317724**
Applicant:	**Kate Cole OAM**
Respondent:	**Department of State Development, Infrastructure and Planning (Office of Industrial Relations)**
Third Party:	**CPB Contractors Pty Limited (ACN: 000 893 667) & BAM International Australia Pty Ltd (ACN: 152 589 580) & Ghella Pty Ltd (ACN: 142 392 461) & UGL Engineering Pty Limited (ACN: 096 365 972) together an unincorporated joint venture trading as CPB BAM Ghella UGL Joint Venture (ABN: 80 900 474 484)**
Fourth Party:	**Cross River Rail Delivery Authority (ABN: 21 542 690 798)**
Decision Date:	**26 November 2024**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - air quality monitoring reports concerning tunnelling activities on the Cross River Rail project - whether disclosure would found an action for breach of confidence - sections 47(3)(a) and 48 and schedule 3, section 8(1) of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LAW ENFORCEMENT OR PUBLIC SAFETY INFORMATION - air quality monitoring reports - whether disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law - whether disclosure could reasonably be expected to endanger a person's life or physical safety - whether disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation - whether disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case - whether disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible**

contravention of the law - whether disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment - sections 47(3)(a) and 48 and schedule 3, sections 10(1)(a), (c), (d), (e), (f) and (i) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - air quality monitoring reports - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the respondent (**OIR**) for access under the *Right to Information Act 2009* (Qld) (**RTI Act**) to air monitoring reports on the Cross River Rail project between 1 January 2015 to 1 July 2023.[1]

2. OIR located 1628 responsive pages. Following consultation with three entities (including the third and fourth parties), who objected to disclosure of the reports, OIR decided to refuse access under the RTI Act on the grounds that disclosure of the reports would, on balance, be contrary to the public interest.[2]

3. The applicant applied to the Office of the Information Commissioner (**OIC**), under Chapter 3, Part 9 of the RTI Act, for review of OIR's decision.

4. For the reasons explained below, I set aside OIR's decision refusing access. In substitution for it, I find that the requested reports are not exempt information under the RTI Act, and nor would their disclosure, on balance, be contrary to the public interest. There are therefore no grounds to refuse access to the reports under the RTI Act.

Background

5. Cross River Rail (**CRR**) is a Queensland government infrastructure project consisting of the construction of a new 10.2km rail line that includes 5.9 km of twin tunnels running under the Brisbane River and central business district, with four new underground train stations.[3] It is being delivered in partnership with the private sector, through three major infrastructure contract packages. CRR's construction phase is expected to be completed in 2025, with the anticipated opening in 2026. The total cost of the project is estimated to be more than $6 billion.[4]

6. The applicant is a PhD student in the University of Sydney's Faculty of Medicine & Health, School of Public Health. She is conducting research into the work environment

[1] Application lodged 11 August 2023. The initial scope of the applicant's access application was wider, but was reduced following discussions between the applicant and OIR.
[2] Decision dated 24 November 2023.
[3] <https://crossriverrail.qld.gov.au/>, accessed 29 October 2024.
[4] *'Queensland government reveals Cross River Rail cost blowout of $960 million, now not due to open til 2026'* <https://www.abc.net.au/news/2023-03-31/qld-cross-river-rail-cost-blowout-brisbane/102173588>, accessed 29 October 2024.

of tunnel construction workers in Australia, specifically, their exposure to respirable crystalline silica.[5]

7. The third party consists of various private contractors who, together, comprise the CPB BAM Ghella UGL Joint Venture (**JV**), which is responsible for designing and constructing the tunnels and train stations that form part of CRR.

8. The fourth party (**CRRDA**) is a statutory authority established by the Queensland government under the *Cross River Rail Delivery Authority Act 2016* (Qld) (**CRRDA Act**) to plan, carry out, promote and coordinate activities on behalf of the Queensland government to facilitate the efficient delivery of CRR.[6]

9. Workplace Health and Safety Queensland (**WHSQ**) is part of OIR. WHSQ is Queensland's work health and safety regulator under the *Work Health and Safety Act 2011* (Qld) (**WHS Act**). Its purpose is to '*improve work health and safety and reduce the risk of work-related fatalities, injuries and disease*'.[7] WHSQ's functions include monitoring and enforcing compliance with applicable workplace health and safety standards.[8] It received copies of the air monitoring reports from the JV at various times throughout the relevant stages of CRR.

External review process

10. Upon commencement of the external review, OIC contacted the three entities that had been consulted by OIR during its processing of the access application in order to ascertain whether they maintained an objection to disclosure of the reports and, if so, whether they wished to become participants in OIC's review.[9]

11. The JV and CRRDA responded by advising that they maintained an objection to disclosure, and wished to become participants. No response was received from the company responsible for conducting the air quality monitoring and preparing the reports for the JV.[10] That company therefore was not consulted further during the course of the review and is not a participant.

12. The parties to the review were provided with a number of opportunities throughout the course of the review to lodge written submissions in support of their respective positions, and in response to the submissions lodged by others. The material provided by the parties that I have taken into account in making my decision comprises the following:

- *applicant*: the access application, the application for external review, and submissions dated 17 May 2024 and 22 August 2024
- *OIR*: the decision dated 24 November 2023 and a submission dated 1 August 2024
- *JV*: the response dated 8 November 2023 to OIR's consultation letter, the response dated 22 April 2024 to OIC's consultation letter, and a submission dated 18 June 2024; and
- *CRRDA*: the response dated 26 October 2023 to OIR's consultation letter and a submission dated 14 June 2024.

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[5] As stated in the access application.
[6] See section 3 of the CRRDA Act. CRRDA is excluded from the RTI Act in relation to its functions, except so far as they relate to community service obligations under the CRRDA Act: see sections 14 and 17 and schedule 2, part 2, item 22, of the RTI Act.
[7] <https://www.worksafe.qld.gov.au/about/who-we-are/workplace-health-and-safety-queensland>, accessed 29 October 2024.
[8] Section 152(b) of the WHS Act.
[9] See section 89 of the RTI Act.
[10] In its response dated 23 October 2023 to OIR's consultation letter, the company simply stated that the reports were the property of its client, the JV.

Reviewable decision

13. The decision under review is OIR's refusal of access decision dated 24 November 2023.

Evidence considered

14. Evidence, submissions,[11] legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).[12]

Information in issue

15. The information in issue consists of 1628 pages of Occupational Hygiene Exposure Assessment Reports (**Reports**), prepared for the JV by a health, safety and hygiene consultancy during 2020 and 2021. The Reports contain data relating to static and personal exposure monitoring of respirable crystalline silica (**RCS**), respirable dust and diesel particulate matter at various locations throughout the various CRR sites.

16. The Reports also contain data relating to noise monitoring, which does not fall within the scope of the access application and is therefore not in issue in this review.

17. The applicant has indicated that she does not seek access to the personal information of any individual contained in the Reports. This includes the names of any workers who were subject to air quality monitoring, as well as the names, signatures and contact details etc of any individual involved in requesting, administering, or reporting on, the monitoring.[13] Therefore, this information is not in issue.

Issues for determination

18. OIR's decision under review refused access to the Reports solely on public interest grounds. However, during the course of the review, OIR, the JV and CRRDA variously raised the application of the following exemption provisions:

- schedule 3, section 8(1): disclosure would found an action for breach of confidence
- schedule 3, section 10(1)(a): disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case
- schedule 3, section 10(1)(c): disclosure could reasonably be expected to endanger a person's life or physical safety
- schedule 3, section 10(1)(d): disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation
- schedule 3, section 10(1)(e): disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case

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[11] See paragraph 12.
[12] Generally, it is necessary that decision makers have regard to the *Human Rights Act 2019* (Qld) (**HR Act**). However, section 11(1) of the HR Act provides that *'[a]ll individuals **in Queensland** have human rights'* (my emphasis) and, given the applicant resides in a State other than Queensland, I have not had direct regard to the HR Act in this review. I have, of course, observed and respected the law prescribed in the RTI Act in making this decision. Where the HR Act applies, doing so is construed as 'respecting and acting compatibly with' the rights prescribed in the HR Act (*XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (***XYZ***) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111]). Accordingly, had it been necessary for me to have regard to the HR Act in this review, the requirements of section 58(1) of that Act would be satisfied, and the following observations of Bell J about the interaction between the Victorian analogues of Queensland's RTI Act and HR Act would apply: *'it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act'* (*XYZ* at [573]).
[13] Confirmed by the applicant in an email to OIC on 6 November 2024.

- schedule 3, section 10(1)(f): disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law; and
- schedule 3, section 10(1)(i): disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.

19. The first issue for determination is whether the Reports meet the requirements of any one of these exemption provisions. If they do, access may be refused on that basis and there is no need to go on to consider the application of the public interest balancing test.[14] This is because Parliament has already decided that it would be contrary to the public interest to disclose exempt information.[15]

20. If, however, I am not satisfied that the requirements of any of the exemption provisions have been met, it then becomes necessary to determine whether disclosure of the Reports would, on balance, be contrary to the public interest.

Preliminary issue - document of an agency

21. In its submission to OIR dated 8 November 2023, the JV argued that the Reports were not *'documents of an agency'* under section 12 of the RTI Act because CRRDA is not an entity that is subject to the RTI Act except when it is exercising its community service obligations.[16]

22. In a letter to the respondent parties dated 21 May 2024, OIC advised that this submission appeared to be misconceived as the Reports were in the hands of OIR, which is subject to the RTI Act, and the access application sought access to the Reports from OIR. The Reports were therefore presumed to fall within section 12 of the RTI Act as *'documents of an agency'* and accessible under the RTI Act. OIC went onto state that, *'It is only if it could be established that OIR has no present legal entitlement or authority to deal with the documents under the RTI Act (see the discussion in* Carmody v Information Commissioner & Ors (4) *[2018] QCATA 17 at [66]) that the issue of whether or not the documents are subject to the RTI Act would arise'.*

23. If any party wished to make submissions relevant to this issue, they were invited to do so.

24. In its submission dated 18 June 2024, the JV confirmed that it did not press its previous submission insofar as it related to CRRDA, but went on to contend as follows:

> *However, if it is the case that the OIR (WHSQ) is to be regarded as not having received the monitoring data properly, via an exercise of section 155 or section 171 powers under the WHS Act, then this will raise the question of whether the records have been received in an official capacity as contemplated by section 12 of the RTI Act.*

[14] See *7CLV4M and Department of Communities* (Unreported, Queensland Information Commissioner, 21 December 2011) at [20], where the Assistant Information Commissioner explained that when considering non-disclosure, the logical first step is to consider whether the information comprises exempt information and, only if it does not, is it necessary to complete the steps set out in section 49 of the RTI Act to decide whether disclosing particular information is contrary to the public interest. This approach was referred to with approval on appeal to the Queensland Civil and Administrative Tribunal: *BL v Office of the Information Commissioner, Department of Communities* [2012] QCATA 149 at [15]-[16]. See also *Dawson-Wells v Office of the Information Commissioner & Anor* [2020] QCATA 60 at [17] and *Mokbel v Queensland Police Service* [2023] QCATA 158 at [30].
[15] Section 48(2) of the RTI Act.
[16] See footnote 6.

25. The JV did not elaborate on this argument or provide any material to suggest anything other than that WHSQ received the Reports in its official capacity as regulator under the WHS Act. As will be discussed in more detail below, the Reports were commissioned by the JV and provided voluntarily by the JV to WHSQ to assist WHSQ to discharge its regulatory function under the WHS Act of monitoring the JV's compliance with its obligations under section 49 of the *Work Health and Safety Regulation 2011* (Qld) (**WHS Regulation**).

26. I do not accept that the fact that the Reports were provided voluntarily by the JV, and that WHSQ was not required to use its compulsory powers under the WHS Act to obtain access to them, brings into question the legitimacy of WHSQ's entitlement to possession of the Reports. I note that OIR has not sought to raise arguments of this nature.

27. Accordingly, on the material before me, I am satisfied that the Reports are properly to be regarded as *'documents of an agency'* within the meaning of section 12 of the RTI Act, as documents that are in the possession, or under the control, of OIR. They are therefore subject to the RTI Act.

Exempt information - relevant law

28. The RTI Act gives a right of access to documents of government agencies.[17] The Act must be applied and interpreted to further this primary object,[18] and is to be administered with a pro-disclosure bias.[19]

29. This right of access is subject to other provisions of the RTI Act, including grounds on which access may be refused. These grounds are to be interpreted narrowly.[20] Access may be refused to information to the extent the information comprises exempt information.[21]

30. Under section 87(1) of the RTI Act, OIR has the onus on external review of establishing that its refusal decision was justified or that the Information Commissioner should give a decision adverse to the applicant.

Application of schedule 3, section 8 of the RTI Act - breach of confidence

31. The test for exemption under schedule 3, section 8(1) of the RTI Act must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by an agency such as OIR.[22] In the circumstances of this case, the hypothetical plaintiff is the JV.

32. Following the decision of the Queensland Civil and Administrative Tribunal (**QCAT**) in *Ramsay Health Care v Office of the Information Commissioner & Anor*,[23] it has been established that the cause of action referred to in schedule 3, section 8(1) of the RTI Act can arise in either contract or equity.

33. In its response to OIR's consultation letter, the JV argued that disclosure of the Reports would give rise to an action in contract for breach of confidence. On external review,

[17] Section 23(1)(a) of the RTI Act.
[18] Section 3(2) of the RTI Act.
[19] Section 44 of the RTI Act.
[20] Section 47(2)(a) of the RTI Act.
[21] Sections 47(3)(a) and 48, and schedule 3 of the RTI Act.
[22] *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (***B and BNRHA***).
[23] [2019] QCATA 66 (***Ramsay***).

the JV was asked to provide copies of the relevant contractual document/s that it claimed contained provisions binding OIR not to disclose the Reports. In response, it provided extracts of a number of confidentiality clauses contained in various contracts concerning CRR. However, none appeared to operate to bind OIR. The JV was asked to further clarify its claim. In its submissions dated 18 June 2024, the JV did not pursue the existence of a contractual obligation of confidence, and did not provide copies of any relevant contractual documents. It did, however, argue that OIR was bound by an equitable obligation of confidence in respect of the Reports. In its submission dated 1 August 2024, OIR also argued that an equitable obligation existed. While not being in a position to make submissions of this nature because it was not involved in the supply of the Reports to OIR, CRRDA submitted that it *'would not oppose any submission made by another party'* to the effect that the Reports are subject to an equitable obligation of confidence.[24]

34. For the sake of completeness, before I deal with the claimed equitable obligation of confidence, I record that I am not satisfied that the JV has provided evidence sufficient to establish that disclosure of the Reports by OIR under the RTI Act would give rise to an action in contract for breach of confidence.

Equitable obligation of confidence

35. Equity provides a jurisdiction by which the courts will restrain a breach of confidence independently of any right at law. An equitable obligation of confidence can arise where the formalities for the formation of a contract are not present. The obligation arises where information with the necessary quality of confidence is imparted in circumstances importing an obligation of confidence.

36. The cumulative requirements to establish an equitable obligation of confidence are as follows:

1. the information in question must be identified with specificity
2. it must have the necessary quality of confidence
3. it must have been received in circumstances importing an obligation of confidence; and
4. there must be an actual or threatened misuse of the information.[25]

Discussion

37. I consider that requirements 1 and 2 are met by the Reports. The Reports can be identified with specificity, and I am satisfied that they possess the necessary quality of confidence: they are not generally available in the public domain and are not common knowledge, and nor do they comprise trivial or useless information.

38. The third requirement is that the information must have been communicated and received in circumstances that import an obligation of confidence. Generally, an obligation of confidence is imposed at the time the information is imparted. It can be imposed expressly or by implication, based on the circumstances. This is usually the most difficult requirement to satisfy and requires that the *'recipient should be fixed with*

[24] Submission dated 14 June 2024.
[25] *Ramsay* at [94], adopting previous formulations in *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281 and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73. There will generally be a fifth element where the entity claiming to be owed the confidence is another government body. It is unlikely to apply in other circumstances.

an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it."[26]

39. The existence and scope of any obligation of confidence will be determined both by what the entity receiving the information knew, and what they ought to have known in the circumstances. Even when there is no express mention of confidentiality (or otherwise), certain kinds of communications can be ones which the participants generally assume will be treated as confidential. It is necessary to consider and evaluate all of the relevant circumstances surrounding the supply of the information to determine whether those circumstances, as a whole, imparted an obligation of confidence.[27] Relevant circumstances may include:

- whether the information was provided for free or in exchange for payment
- whether there exists any past relationship or practices between the parties that could lead to an understanding that the provided information would be treated confidentially
- whether the provider of the information has any demonstrable interest in the information or the purpose to which it will be put
- the nature and sensitivity of the information and the relationship between the parties
- any warnings or promises that were given or requested about confidentiality[28]
- any steps taken to preserve or emphasise secrecy or special care taken to restrict disclosure[29]
- the terms of any service or other agreements;[30] and
- any relevant statutory frameworks.[31]

40. In *Ramsay*, it was recognised that another circumstance to be taken into account, when considering the matrix of relevant considerations attending the communication of the information, is the public interest in having access to the particular information:[32]

> *In the case of information produced to and held by a government agency, it can be accepted that the public interest in having access to the particular information is one of the factors to be considered when ascertaining whether or not that information is held under an obligation of confidence. Indeed, it may be a factor to which considerable weight attaches. But it is not the sole determining factor. It needs to be weighed in the mix of all the relevant circumstances under which the information was imparted to ascertain whether the information is held subject to an equitable obligation of confidence.*

41. The JV and OIR have not supplied evidence of any communications between the JV and WHSQ that could give rise to an express obligation of confidence. There is no evidence before me to suggest, in fact, that at the time the Reports were supplied, either party specifically turned its mind to their confidentiality or otherwise, or to any particular conditions attaching to their supply and receipt. The Reports are marked with a stipulation by the author about reproduction, and Appendix 4 to the Reports (titled 'Sample Record Information') that contains the names of the workers who were the subjects of the sample air quality testing, is marked 'Confidential'. However, as noted above, the author of the Reports is not a party to the review and did not respond to OIC's consultation letter. When initially consulted by OIR, it simply advised that it

[26] *B and BNRHA* at [76].
[27] *B and BNRHA* at [84].
[28] Bullet points 1-5: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1991) 28 FCR 291 at 302-303; *Ramsay* at [78].
[29] *New Zealand Needle Manufacturers Ltd v Taylor* [1975] 2 NZLR 33, 45.
[30] *Ramsay* at [87].
[31] *Ramsay* at [87].
[32] *Ramsay* at [82].

considered the Reports to be the property of its client, the JV. I am not aware of the terms under which the JV engaged the author to prepare the Reports. But it can be assumed from the author's response that it does not seek to enforce any stipulations or conditions that it may have communicated to the JV at the time of supply of the Reports. In terms of the JV's subsequent supply of the Reports to OIR, there is no evidence to indicate that the JV drew particular attention to Appendix 4 or its confidential marking. Simply marking information as 'confidential' does not automatically give it the required quality of confidence.[33] But in any event, as I have noted above, the applicant does not seek access to the names of workers contained in Appendix 4.

42. As I will discuss further below, it appears that the Reports were supplied proactively and voluntarily to WHSQ by the JV at various intervals during the tunnelling phase of CRR, through various modes of communication, for the purpose of assisting WHSQ to discharge its regulatory functions under the WHS Act.

43. As noted at paragraph 39, even when there is no express mention of confidentiality, an obligation of confidence may be implied through an evaluation of all of the relevant circumstances surrounding the supply of the information to determine whether those circumstances, as a whole, imparted an obligation of confidence.

44. The JV and OIR made the following submissions concerning the circumstances and legislative framework surrounding the communication of the Reports that they contend gave rise to a mutual understanding of confidence:[34]

    a) The relationship between the JV and WHSQ under the WHS Act is that of *'person conducting a business or undertaking'* (**PCBU**),[35] and regulator.
    b) As a PCBU, the JV must ensure, so far as reasonably practicable, the health and safety of its workers while at work. This includes ensuring, so far as is reasonably practicable, that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness of or injury to workers arising from the conduct of the business or undertaking.[36]
    c) Under section 49 of the WHS Regulation, a PCBU must ensure that its workers are not exposed to a substance or mixture in an airborne concentration that exceeds the relevant exposure standard.
    d) As regulator, WHSQ is responsible for monitoring, and enforcing compliance with, the duties owed by PCBUs to workers, including the duty owed pursuant to section 49 of the WHS Regulation.
    e) The Reports were commissioned by the JV and provided by the JV to WHSQ to enable WHSQ to discharge its regulatory function of monitoring the JV's compliance with section 49 of the WHS Regulation.
    f) WHSQ has power under sections 155 and 171 of the WHS Act to issue a notice compelling a person to provide documents or evidence that will assist WHSQ to monitor or enforce compliance with the WHS Act. However, no such regulatory notices were issued to the JV compelling the supply of the Reports. The JV is unable to determine precisely how and by whom the Reports were released to WHSQ. However, it submits that it was under an obligation to provide reasonable assistance to WHSQ in the discharge of WHSQ's functions, and the Reports were supplied voluntarily in the context of working cooperatively and transparently with the regulator.

[33] *B and BNHRA* at [-81].
[34] The JV's submission dated 18 June 2024 and OIR's submission dated 1 August 2024.
[35] Section 5 of the WHS Act.
[36] Section 19(1) and 19(3) of the WHS Act.

g) OIR submits that its review of the circumstances under which WHSQ received the Reports indicate that they were received in a number of different ways, including as part of investigations of notifiable incidents or complaints, or proactively supplied by the JV. At least some were submitted via an online portal, and others were provided by email.
h) Despite the fact that the Reports were not obtained by WHSQ as a result of the exercise of its compulsory information-gathering powers, it was nevertheless impliedly understood between the parties that the Reports were supplied for the limited purpose of enabling WHSQ to perform its regulatory function of monitoring and enforcing the JV's compliance with the WHS Act, and their use or disclosure beyond that purpose was not contemplated or agreed.
i) WHSQ came into possession of the Reports through the exercise of a power or function under the WHS Act. The Reports are therefore subject to the statutory obligation of confidence contained in section 271 of the WHS Act. This provides further support for finding that it must have been reasonably understood between the parties that the supply of the Reports was accompanied by an expectation of confidence.
j) The Reports contain information of a sensitive nature, comprising air monitoring data collected in respect of individual workers at various points in time.

45. Accordingly, in making their argument that it is reasonable to find that the Reports were supplied subject to an implied understanding of confidence, the JV and OIR do not point to any particular practices between the parties, nor to any discussions, warnings or promises that were given or requested about confidentiality. Nor do they identify any particular steps taken to preserve or emphasise the secrecy of the Reports, or special care taken to restrict their disclosure. Rather, the Reports appear to have been supplied in an informal, ad hoc, manner throughout the relevant stages of the project, using various modes of communication.

46. The JV and OIR rely chiefly on the statutory framework of the WHS Act as giving rise to relevant circumstances importing an obligation of confidence, as well as on the sensitive nature of the information contained in the Reports.

47. As to the latter point, I accept that the air monitoring data contained in the Reports, as it attaches to identified workers, is information of a sensitive nature. However, as noted, the applicant does not seek access to the name of any worker. I consider that the sensitivity of the data, in a de-identified form, is therefore reduced. Given the size of the workforce involved in CRR, together with the fact that the Reports date from 2020/2021 and are therefore three to four years old, I consider it is unlikely that workers involved in the testing could readily be identified merely from the date of the testing, and a general description of the worker's classification/role (for example, 'electrical worker') and task. In assessing the sensitivity of the Reports, I have also taken account of the fact that they do not contain, for example, sensitive medical or other personal information of the individuals involved in the testing. As to the sensitivity of the testing data more generally, while I am prevented from disclosing information that is claimed to be exempt or contrary to the public interest information,[37] I would simply record that I do not consider that the data itself, given its nature, reveals information with a particularly heightened degree of sensitivity.

48. Regarding the operation of the WHS Act, I accept, as per *Ramsay*, that the legislative framework that surrounds the supply of information may be a relevant factor to take into account when assessing the circumstances of a communication of information claimed to be confidential, as well as the relationship between the parties.

[37] See section 108(3) of the RTI Act.

49. The relationship between the JV and WHSQ is governed by statute – they are duty holder (PCBU) and regulator, respectively, under the WHS Act, and each has duties and obligations pursuant to that legislation. The JV accepts that the Reports were commissioned specifically for the purposes of section 49 of the WHS Regulation, which requires the JV to ensure that its workers are not exposed to a substance or mixture in an airborne concentration that exceeds the relevant exposure standard. The Reports were provided voluntarily by the JV to WHSQ to enable WHSQ, as regulator, to discharge its commensurate duty under the WHS Act to monitor and, if necessary, to take action, to enforce the JV's compliance with section 49 of the WHS Regulation.

50. Where an entity is required to discharge a statutory obligation, and it supples information to a regulator to demonstrate to the regulator that the obligation has been discharged, I am not satisfied, as a general principle, that equity will intervene to hold the regulator conscience-bound not to disclose that information. I consider that the proper discharge of a regulatory role will often be incompatible with a finding that the regulator is subject to an obligation of confidence in respect of the supplied information.[38] How, for example, would such an obligation of confidence on WHSQ operate if the JV were to be prosecuted for a breach of section 49 of the WHS Regulation? As the regulator under the WHS Act, WHSQ is charged with enforcing compliance by duty holders of their statutory obligations. In such circumstances, it is necessary to examine the legislation that governs both the relationship between the parties, and the supply of the information, to determine the uses for which the parties should reasonably have expected the information might need to be put in order for the regulator to discharge its obligations on behalf of the public. Only if the proposed use goes beyond that which ought to have been within the reasonable contemplation of the parties pursuant to the legislation, will equity potentially intervene to protect the information. I will discuss this issue in more detail further below.

51. The JV and OIR rely heavily upon the confidentiality provision contained in section 271 of the WHS Act as lending support to a finding that a reasonable expectation of confidence attached to the supply of the Reports. Section 271 of the WHS Act relevantly provides as follows:

> ***Confidentiality of information***
>
> *(1) This section applies if a person obtains information or gains access to a document in exercising any power or function under this Act, other than under part 7.*
>
> *(2) The person must not do any of the following—*
>
> *(a) disclose to anyone else—*
> *(i) the information; or*
> *(ii) the contents of or information contained in the document;*
> *(b) give access to the document to anyone else;*
> *(c) use the information or document for any purpose.*
>
> *Maximum penalty – 100 penalty units.*
>
> *(3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—*

[38] See *Seven Network (Operations) Limited and Safe Food Production Queensland* (Unreported, Queensland Information Commissioner, 10 February 2012). See also *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28 (28 July 2016) (***Ardent Leisure***).

> *(a) about a person, with the person's consent; or*
> *(b) that is necessary for the exercise of a power or function under this Act; or*
> *(c) that is made or given by the regulator or a person authorised by the regulator and is authorised under section 271A; or*
> *(d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or*
> *(e) that is required or authorised under a law; or*
> *(f) to a Minister.*

52. The JV and OIR spent some time in their respective submissions arguing why the exception to confidentiality contained in section 271(3)(e) of the WHS Act - *'required or authorised under a law'* - does not apply to disclosure under the RTI Act. However, I do not consider that this is in contention. I am not satisfied that these types of standard exceptions to a statutory confidentiality provision apply to disclosure of information under the RTI Act.[39] In the absence of a decision under the RTI Act to disclose the Reports (and in respect of which all appeal rights have been finalised/expired), or a proper exercise of the discretion to release information (a discretion denied OIC on external review), any disclosure would not be required or authorised under the RTI Act.

53. The JV and OIR also submitted that, although the supply of the Reports was voluntary (and did not arise through the exercise of WHSQ's compulsory information-gathering powers) the Reports were nevertheless obtained by WHSQ pursuant to the WHS Act to enable it to discharge its regulatory function of monitoring the JV's compliance with section 49 of the WHS Regulation. They were therefore *'obtained'* by WHSQ within the meaning of section 271(1) of the WHS Act. Again, I would not challenge this submission. I accept that the Reports are subject to a statutory obligation of confidence pursuant to section 271(2) of the WHS Act, unless any of the exceptions contained in section 271(3) apply. (I will discuss further below, the exception contained in section 271(3)(b) – where disclosure is necessary for the exercise of a power or function under the WHS Act.)

54. However, a breach of a statutory confidentiality provision does not, of itself, found an action for breach of confidence under the general law, and therefore does not give rise to the application of the exemption contained in schedule 3, section 8(1) of the RTI Act.[40] I also note that section 271 of the WHS Act is not listed in the exemption contained in schedule 3, section 12 of the RTI Act. It may, however, be relevant to the application of the public interest balancing test as a factor favouring nondisclosure: see schedule 4, part 3, item 22 of the RTI Act. I will discuss this further below.

55. In its submission, OIR discussed the relationship between equitable and statutory obligations of confidence, and whether they can co-exist. After analysing a number of cases,[41] OIR submitted that the Reports can only comprise exempt information under schedule 3, section 8(1) of the RTI Act if:

- they are subject to the statutory obligation of confidence contained in section 271 of the WHS Act; and

[39] See, for example, *Maurice Blackburn Lawyers and Queensland Treasury; AAI Limited (Third Party); RACQ Insurance Ltd (Fourth Party)* [2020] QICmr 66 (4 November 2020) at [44].
[40] *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; 7 AAR 187. See also *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 210 where the Deputy President found that *'Actions… for breach of statutory duty are not actions for breach of confidence known to the general law'.* This finding was not disputed by QCAT in *Ramsay.*
[41] *Matthews and Australian Securities and Investments Commission and Newmont Australia Ltd (Party Joined) and Ryan (Party Joined) and Knapp (Party Joined)* [2010] AATA 649 (28 August 2010), and *RSPCA Australia and the Department of Agriculture, Fisheries and Forestry (Freedom of Information)* [2024] AICmr 33 (15 February 2023).

- they would be contrary to the public interest to disclose; and
- they were communicated by a business to OIR; and
- they were provided for the limited purpose of enabling OIR to perform its regulatory functions; and
- the fact that they would be treated as public documents was not adverted to.

56. I do not accept that this analysis can properly be drawn from the cases relied upon, or that it is a correct summation of the relevant principles. As I will explain below, where information is subject to a statutory obligation of confidence, this may be a factor to take into account when assessing the third requirement of an equitable obligation and what were the reasonable expectations of the parties to the communication, but it is not, of itself, determinative of whether such an obligation exists. Secondly, in terms of public interest considerations, as *Ramsay* made clear, a relevant factor to take into account is the public interest in accessing the information, not whether it would be contrary to the public interest to disclose it. A public interest balancing exercise is not required. Lastly, I do not accept that a mere assertion by parties to a communication that they did not contemplate public disclosure of information is determinative of whether the information was communicated in circumstances giving rise to an obligation of confidence.

57. In terms of a statutory confidentiality provision such as section 271 of the WHS Act (the purpose of which is to prevent the indiscriminate disclosure of information which an agency officer may have access to in the course of discharging their duties under the WHS Act), I do not accept that the mere existence of such a provision is determinative of whether a court of equity will intervene to fix the recipient of information with an enforceable obligation of confidence. To the contrary, in my view, in order for a party to go beyond the protection of information provided by statute, and establish that an equitable obligation of confidence also exists in respect of that information, the party must do more than simply rely upon the existence of the statutory confidentiality provision. It must go beyond the provision to show that some additional or special circumstances exist that would justify equity intervening to hold the recipient of the information conscience-bound to keep the information confidential.

58. In respect of the 'limited purpose' test, while the Reports were not supplied to WHSQ in response to a compulsory notice, the JV nevertheless relies on the principle set out in *Johns v Australian Securities Commission*[42] (***Johns***) as follows:

> *A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes upon the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining the information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is closely analogous to a duty imposed by equity on a person who receives information of a confidential nature in circumstances importing a duty of confidence.*

59. The JV submits that the Reports were supplied for the limited purpose of the JV demonstrating to WHSQ that it was complying with section 49 of the WHS Regulation in terms of meeting applicable air quality standards. It argues that it was therefore reasonably understood between the parties that the Reports could not be used, or disclosed, by WHSQ for any other purpose.

[42] (1993) 178 CLR 408 at [14].

60. I have already noted (at paragraph 50 above) that the proper discharge of a regulatory role will often be incompatible with a finding that the regulator is subject to an obligation of confidence in respect of information supplied to it to enable it to discharge its regulatory functions.

61. Secondly, I do not accept that the principle expressed in *Johns* necessarily applies in circumstances where information is provided voluntarily. *Johns* dealt specifically with the exercise of a power to compel the production of information under section 19 of the *Australian Securities Commission Act 1989* (Cth), that is, the power to compel persons to appear for examination on oath and to answer questions. Furthermore, the court found that a person who obtained information in the exercise of the compulsory power contained in section 19 came under a statutory (not equitable) duty of confidence with respect to the information. It was therefore important to ascertain the purposes, under the legislation, for which the information could legitimately be used or disclosed.

62. Accepting that the JV's specific purpose in supplying the Reports to WHSQ was to demonstrate compliance with the WHS Regulation, the 'limited purpose' test must nevertheless be applied against the competing interests of both parties to the communication, rather than simply from the confider's point of view.[43] While the JV's purpose in providing the Reports was simple and narrow, WHSQ's purpose in receiving them was necessarily broader, given its functions as the regulator under the WHS Act, which include:

- providing advice and information on work health and safety to duty holders and to the community
- to collect, analyse and publish statistics relating to work health and safety[44]
- to promote and support education and training on matters relating to work health and safety; and
- to engage in, promote and coordinate the sharing of information to achieve the objects of the WHS Act.[45]

63. Given these broad functions (and noting that section 271(3)(b) of the WHS Act provides an exception to the statutory obligation of confidence in section 271(2) where disclosure of information is necessary for the exercise of a power or function under the WHS Act), the question is whether equity would hold it to be an unconscionable use of the Reports for OIR to disclose them to the applicant without the JV's consent.

64. As was stated in *B and BNRHA*:

> *Another principle of importance for government agencies was the Federal Court's acceptance in* Smith Kline & French *that it is a relevant factor in determining whether a duty of confidence should be imposed that the imposition of a duty of confidence would inhibit or interfere with a government agency's discharge of functions carried on for the benefit of the public. The Full Court in effect held that the restraint sought by the applicants on the Department's use of the applicant's confidential information would go well beyond any obligation which ought to be imposed on the Department, because it would amount to a substantial interference with vital functions of government in protecting the health and safety of the community. …*

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[43] *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1991) 28 FCR 291 at 302-304.
[44] I note that OIR has previously contributed data and statistics to studies/inquiries into occupational respirable dust issues, including providing information about dust levels experienced by workers on earlier tunnelling projects in Queensland, including the Clem Jones Tunnel, Airport Link and Legacy Way: <https://documents.parliament.qld.gov.au/tp/2017/5517T1855.pdf>, accessed 31 October 2024.
[45] Section 152 of the WHS Act.

> *Thus, when a confider purports to impart confidential information to a government agency, account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions. Information conveyed to a regulatory authority for instance may require an investigation to be commenced in which particulars of the confidential information must be put to relevant witnesses, and in which the confidential information may ultimately have to be exposed in a public report or perhaps in court proceedings.*[46]

65. Having regard to the broad functions of WHSQ under the WHS Act, I consider that imposing a duty of confidence in respect of the Reports would unreasonably interfere with WHSQ's ability to discharge those functions. In my view, it should reasonably have been within the contemplation of the parties that disclosure by WHSQ of the data contained in the Reports might be necessary to discharge some functions (including for educational and statistical reporting purposes) and to aid in achieving the primary object of the WHS Act, namely, '*the protection of workers and other persons against harm to their health, safety and welfare through the elimination or minimisations of risks arising from work or from particular types of substances or plant'*.[47] Disclosure of the data contained in the Reports will assist in educating duty holders and the public more generally about exposure to RCS and about the effectiveness of the safety measures that were employed on CRR in an effort to eliminate or minimise that exposure. The learnings from CRR will serve to better protect tunnel workers in the future against any harm to their health and safety, thereby achieving one of the primary objects of the WHS Act.

66. Turning now to public interest considerations, as Queensland's work health and safety regulator under the WHS Act, WHSQ at all times acts on behalf of the public, and in the public interest. Information is held, received and imparted by WHSQ to further the public interest in ensuring that the objects of the WHS Act are achieved. WHSQ is at all times accountable to the Queensland public for the discharge of its functions. In the specific circumstance of this case, CRR is a significant public infrastructure project, funded by significant public monies. The workers who were the subject of the air monitoring testing that is recorded in the Reports are, in effect, employed by the people of Queensland and are owed a duty of care by the people of Queensland, which duty they expect WHSQ to discharge on their behalf. It is against this background that the notion of an obligation of conscience that binds WHSQ to keep the Reports confidential must be considered:

> *... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...*
>
> *... But the relationship between the modern State and its citizens is so different in kind from that which exists between private citizens that rules worked out to govern the contractual, property, commercial and private confidences of citizens are not fully applicable where the plaintiff is a government or one of its agencies. Private citizens are entitled to protect or further their own interests, no matter how selfish they are in doing so. Consequently, the publication of confidential information which is detrimental to the private interest of a citizen is a legitimate concern of a court of Equity.* ***But governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which Equity determines whether it will protect information which a government or***

[46] At [92]-[93].
[47] Section 3(1) of the WHS Act.

governmental body claims is confidential.[48]

[emphasis added]

67. As was made clear in *Ramsay*, the public interest in obtaining access to the Reports is a factor to be taken into account when considering all of the circumstances surrounding the communication of the Reports, and may be a factor deserving of significant weight. In respect of this issue, the applicant submits relevantly as follows:

    a) Over-exposure to RCS is known to lead to the development of silica-related diseases, including silicosis and lung cancer.
    b) Tunnel construction workers have shown the highest measured exposures to RCS within the construction industry internationally.
    c) At present, limited information is available regarding the prevalence of occupational exposure to RCS within this cohort in Australia, and the resultant development of lung disease.
    d) The applicant aims to address this knowledge gap by accessing and analysing data that relates to occupational exposure to RCS among Australian tunnel construction workers, and publishing findings in a scientific journal.
    e) The research will assist in improving exposure control in tunnel construction work, with associated improvements in workplace health and safety, and a corresponding reduction in the occurrence of exposure-related disease.
    f) There is a public interest in informing the public of how environmental and health risks to CRR workers were managed, particularly given that CRR is a major infrastructure project, constructed for the public benefit, and funded by public monies.
    g) Disclosure of the Reports will enable the public to scrutinise the effectiveness of the measures put in place to minimise or eliminate risks to workers' health and safety. It will contribute to the transparency of government (WHSQ and CRRDA) concerning their oversight of the JV and CRR on behalf of the people of Queensland.

68. I consider there is a significant public interest in the applicant accessing the Reports. I am satisfied that the data contained in the Reports would contribute significantly to the applicant's research into occupational exposure to RCS of tunnel workers (which is a recognised health hazard), and have the numerous beneficial effects that the applicant has identified in the preceding paragraph. Access will enhance the public interest in achieving the primary objects of the WHS Act, including improving knowledge about workplace health and safety risks that will, in turn, help to better protect future tunnel workers in Australia against risks of harm to their health, safety and welfare. I also note the limited availability of this type of information in Australia, and the likely deleterious impact upon the quality and value of the applicant's research were the data in the Reports to be omitted from that research.

Finding

69. For the reasons I have explained above, I am not satisfied that it has been established, through the relevant circumstances that attended the supply of the Reports, that those circumstances were sufficient to impose an equitable obligation of confidence on OIR in respect of the Reports. I am therefore not satisfied that the onus under section 87(1)there of the RTI Act has been discharged.

[48] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 190-191.

70. In arguing for the existence of an equitable obligation of confidence, the JV and OIR rely almost entirely on the statutory framework of the WHS Act, and the presence in that legislation of a confidentiality provision, rather than any specific circumstances attending the manner in which the Reports were supplied. As noted, a breach of a statutory confidentiality provision does not give rise to an action in equity for breach of confidence. But in any event, the WHS Act permits disclosure of information to enable WHSQ to exercise a power or function under the WHS Act, which includes reporting on, and educating about, work health and safety risks, and ways in which duty-holders can minimise those risks into the future. Given this, and the functions and duties of WHSQ as the regulator more generally, I am not satisfied that the JV and WHSQ could reasonably have held an expectation of confidence regarding the Reports. I acknowledge that the Reports hold some sensitivity, but I would not place significant weight on this factor taking account of the fact that the identities of the tested workers are not in issue, and the information is now three to four years old, as well as the nature of the testing results more generally. When the additional significant weight of the public interest in accessing the Reports is added into the evaluation of this matrix of all of the relevant circumstances surrounding the supply of the Reports, I am not satisfied that the circumstances are sufficient to find that equity would intervene to hold OIR conscience-bound not to disclose the Reports to the applicant.

71. I am therefore not satisfied that the third requirement for establishing the existence of an equitable obligation of confidence is satisfied. As the requirements are cumulative, it follows that I am not satisfied that the Reports comprise exempt information under schedule 3, section 8(1) of the RTI Act.

Application of schedule 3, sections 10(1)(c) and 10(1)(d) of the RTI Act

72. Information will be exempt under schedule 3, section 10(1)(c) if its disclosure could reasonably be expected to endanger a person's life or physical safety. Information will be exempt under schedule 3, section 10(1)(d) if its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation.

73. The phrase *'could reasonably be expected to'* means that the relevant expectation must be reasonably based: that is, there must be real and substantial grounds for expecting the relevant occurrence, which can be supported by evidence or cogent reasoning. There cannot be merely an assumption or allegation that the occurrence will take place, nor an expectation of an occurrence that is merely a possibility or that is speculative, conjectural, hypothetical or remote.[49] Whether the expected consequence is reasonable requires an objective examination of the relevant evidence.[50] Importantly, the expectation must arise as a result of disclosure of the specific information in issue, rather than from other circumstances.[51]

74. Accordingly, for information to be exempt from disclosure under schedule 3, section 10(1)(c) of the RTI Act, the relevant evidence must establish real and substantial grounds for believing that disclosing the information will directly endanger a person's life or physical safety.

75. Similarly, for information to be exempt from disclosure under schedule 3, section 10(1)(d) of the RTI Act, the relevant evidence must establish real and substantial grounds for believing that disclosing the information will directly result in a person being

[49] *Murphy and Treasury Department* (1995) 2 QAR 744 at [44] (***Murphy***), citing *Re B and BNRHA* at [160]. See also *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.
[50] *Murphy* at [45]-[47].
[51] *Murphy* at [54].

subjected to a serious act of harassment or intimidation. The Information Commissioner has noted that, because section 10(1)(d) refers to a 'serious' act of harassment or intimidation, some degree of harassment or intimidation must be permissible before the exemption will apply.[52]

76. In *Sheridan*, the Information Commissioner found that a serious act of harassment means an action that *'attacks, disturbs or torments a person and that causes concern or apprehension or has undesired consequences'*.[53] The Information Commissioner specifically observed that:

- acts which induce fear or force a person into some action by inducing fear or apprehension are acts of intimidation
- acts of intimidation which have undesired consequences or cause concern and/or apprehension are serious acts of intimidation
- acts which persistently trouble, disturb or torment a person are acts of harassment; and
- acts of harassment which have undesired consequences or cause concern and/or apprehension are serious acts of harassment.

77. The Information Commissioner decided that the exemption can apply even where only a single act of serious harassment is expected to result from disclosure of the information. However, there must be a causal link between the disclosure of the information and the expected conduct.[54] This link has been found to exist where there is evidence that such conduct occurred as a result of the release of similar information in the past.[55]

Discussion

78. The JV and CRRDA rely chiefly upon acts of union aggression, harassment and intimidation against the JV's workers to support the application of schedule 3, sections 10(1)(c) and 10(1)(d) of the RTI Act:

> *Personnel on the Project have been subject to serious acts of harassment and intimidation via the conduct of third-party organisations. Those acts have endangered their physical safety. The actual outcome of this conduct has been well documented in the media. In the circumstances, there exists more than a 'mere risk' that this conduct will be repeated. The* [JV] *cannot predict with certainty the threat to safety that is likely to materialise. However, given what has transpired to date, it submits that the threshold standard set by the phrase 'could reasonably be expected to', as provided for in the law enforcement and public safety exemption, has been met.*
>
> *We refer in this connection to* ***Annexure D****, which lists examples of recent media coverage regarding interference in the Project by third-party organisations. There have been approximately 450 pieces of coverage in 2024, concerning the Project and industrial issues with third-party unions.*[56]

79. In its letter dated 22 April 2024, and in Annexure D to its submission dated 18 June 2024, the JV provided links to numerous media reports about instances of union action in relation to CRR operations, including reports of brawls between masked individuals and non-union members at CRR picket lines, numerous work stoppages, blockades

[52] *Sheridan and South Burnett Regional Council, Local Government Association of Queensland Inc and Dalby Regional Council; and Crime and Misconduct Commissioner* (***Sheridan***) (Unreported, Queensland Information Commissioner, 9 April 2009).
[53] *Sheridan* at [199].
[54] *Sheridan* at [307].
[55] *Sheridan* at [317]. *Mathews and University of Queensland* (Unreported, Queensland Information Commissioner, 21 September 2012) at [48]-[49].
[56] Submission dated 18 June 2024.

and the padlocking of site gates, and instances of intimidation of workers attempting to cross picket lines to enter work sites, including by putting the faces of non-aligned workers on placards. It relied upon these examples of past union behaviour as evidence that disclosure of the Reports could reasonably be expected to have the requisite effects provided for in sections 10(1)(c) and (d).

80. Union activity at CRR sites over the past several years is well-documented in the public domain, both through the media reports cited by the JV, and relevant court proceedings. These indicate that union activity has related to a variety of workplace issues, including, for example, wage disputes and enterprise bargaining, air quality, heat stress policies, and site conditions for subcontractors. I accept that at least some union activity, as described in the media reports and court proceedings, can reasonably be regarded as harassing or intimidatory in nature.

81. However, the issue for me to determine is whether disclosure under the RTI Act of the specific information contained in the Reports could reasonably be expected to:

- endanger a person's life or physical safety; and/or
- result in a person being subjected to a serious act of harassment or intimidation.

82. In assessing that issue, I consider the following facts and circumstances are relevant:

- CRR's tunnelling phase concluded in December 2021[57]
- the data contained in the Reports concerns circumstances existing in 2020 and 2021
- what the data discloses;[58] and
- whether any evidence exists to indicate that the release of information of a similar nature in the past has given rise to instances of endangerment of life or physical safety; or to instances of serious acts of harassment or intimidation.

83. In respect of the last of these issues, neither the JV nor CRRDA has provided evidence that specifically links information about air quality testing with instances of the requisite behaviour. The JV referred in its submission to threats having been made against its workplace health and safety officers, but did not provide evidence to indicate that any such behaviour was directly connected with the issue of air quality concerns for tunnel workers.[59] It referenced an article appearing in the *Brisbane Times* on 28 June 2021 that reported that CRR workers had *'downed tools'* between 18 and 21 June 2021 while the JV and CRRDA addressed issues involving dust emanating from the conveyor belt carrying tunnel spoil to the surface.[60] The following is stated in the article:

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[57] *Done and dusted: Cross River Rail tunnelling complete* <https://www.inqld.com.au/news/2021/12/17/done-and-dusted-cross-river-rail-tunnelling-complete>; *First of twin tunnels complete as Cross River Rail reaches another major milestone* <https://crossriverrail.qld.gov.au/news/first-of-twin-tunnels-complete-as-cross-river-rail-reaches-another-major-milestone/>, accessed 4 November 2024.

[58] Again, I note the prohibition contained in section 108 of the RTI Act on disclosing information that is claimed to be exempt information or contrary to the public interest information.

[59] The JV referred to articles appearing in the Australian Financial Review on 22 July 2022 and 25 May 2023: *Judge says CFMEU considers maximum fines 'chump change'* <https://www.afr.com/work-and-careers/workplace/judge-says-cfmeu-considers-maximum-fines-chump-change-20220729-p5b5s7>; and *CFMEU lashed by Federal Court for 'insultingly childish' behaviour at Queensland's Cross River Rail* <https://www.afr.com/work-and-careers/workplace/cfmeu-lashed-for-insultingly-childish-behaviour-at-cross-river-rail-20230525-p5db6w>, accessed 4 November 2024.

[60] *Deadly dust fears prompt walk-off at Cross River Rail worksite* <https://www.brisbanetimes.com.au/national/queensland/deadly-dust-fears-prompt-walk-off-at-cross-river-rail-worksite-20210628-p584y2.html>, accessed 4 November 2024.

> *Mr Bailey* [then Minister for Transport] *referred questions on the matter to the Cross River Rail Delivery Authority. A spokesman said the agency took health and safety seriously and launched an investigation as soon as the issue was raised.*
>
> *"An independent hygienist has been engaged to monitor air quality on site, and all sampling to date has been compliant with project requirements," he said.*
>
> *"Additional dust mitigation measures have also been implemented as a further precaution."*
>
> *The spokesman said Workplace Health and Safety Queensland, which was contacted for comment, had since reconfirmed compliance through its own independent testing and the matter was now resolved.*

84. The article indicates that industrial action in the form of a brief work stoppage was taken by workers over dust concerns, rather than describing any acts or behaviour that would fall within the scope of either of the exemption provisions.

85. Taking account of all of the relevant facts and circumstances as discussed above, I am not satisfied that there is sufficient evidence before me to establish real and substantial grounds for believing that disclosure under the RTI Act of the data contained in the Reports will result in the endangerment of a person's life or physical safety, or in a person being subjected to a serious act of harassment or intimidation.

Finding

86. For the reasons explained, I am not satisfied that requirements for exemption under either schedule 3, section 10(1)(c) or (d) are met by disclosure of the Reports. I therefore find that the Reports do not comprise exempt information under these provisions.

Application of schedule 3, section 10(1)(i) of the RTI Act

87. Information will be exempt under schedule 3, section 10(1)(i) of the RTI Act if its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.

88. This exemption will apply where:

- there exists an identifiable system or procedure
- it is a system or procedure for the protection of persons, property or the environment; and
- disclosure of information could reasonably be expected to prejudice[61] that system or procedure.[62]

89. The relevant methods, procedures etc., must form a sufficiently coherent and organised scheme so to comprise a *'system'*.[63]

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[61] Using the ordinary meaning of this word, which includes to *'affect disadvantageously or detrimentally'*: *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at [16].
[62] *EC71OC and Queensland Police Service* [2019] QICmr 24 (27 June 2019).
[63] An *'organised scheme or plan of action, esp. a complex or comprehensive one; an orderly or regular procedure or method…'; a 'co-ordinated body of methods, or a complex scheme or plan of procedure ….'*: Dictionary definitions cited and applied in *Ferrier and Queensland Police Service* (1996) 3 QAR 350 at [28] which I adopt for the purpose of this decision.

Discussion

90. In its submission to OIR dated 8 November 2023, the JV argued as follows:

> *Workplace Health and Safety Queensland has systems, procedures and wide powers under the* Work Health and Safety Act 2011 *(Qld) to obtain information from a person conducting a business or undertaking (**PCBU**) to demonstrate its compliance with its primary duty care.*
> *…*
> *As between the PCBU and the regulator, a cooperative relationship exists where information is shared with the regulator for the purposes of protecting persons, property and the environment.*
>
> *Information contained in the documents would reveal the type and extent of information (for example ways of assessing hazards or risks, control measures, training, supervision) the regulator may be satisfied with in assessing the discharge of the PCBU's duties.*
>
> *Although the documents disclosed by* [the JV] *to the regulator are unique to … the JV's Project, it is a reasonable inference that other PCBU's* [sic] *could generate similar reports in order to avoid scrutiny by the regulator. In effect, this would circumvent the system and procedure established by the regulator for PCBU's* [sic] *to critically consider the discharge of its duties incumbent upon it on large-scale projects of this nature, similar to the Project.*

91. In its submission to OIC dated 18 June 2024, the JV did not provide further detail in support of the application of this exemption provision to the Reports except to argue that the applicant's *'…prejudicial view of the Project, and the receipt and publication of the Project's monitoring data, divorced from the broader system of work to monitor occupational hygiene, stands to bring about any manner of prejudice as expressed in …* [schedule 3, section 10(1)(i)] *above*.

92. Firstly, I am not satisfied that the ad hoc supply of the Reports to WHSQ throughout the tunnelling phase of CRR can properly be regarded as forming a sufficiently coherent, co-ordinated and organised scheme as to comprise a *'system' or 'procedure'* within the meaning of the exemption provision. Under the WHS Regulation, the JV was required to ensure that its workers were not exposed to a substance or mixture in an airborne concentration that exceeded the relevant exposure standard. WHSQ was required to monitor the JV's compliance with that obligation. The JV elected to discharge its obligation by commissioning independent air monitoring reports, which it then voluntarily supplied to WHSQ at various times, using various methods of communication. I do not consider that this arrangement, agreed to in respect of an individual project and specific to that project, meets the description of an *'identifiable system or procedure'*.

93. Even if I accepted that the arrangement met the requisite description, I am not satisfied that disclosure of the Reports could reasonably be expected to prejudice such a system or procedure, particularly in circumstances where WHSQ has power under the WHS Act to require the production of such information, if necessary. The JV's only argument regarding potential prejudice is that, although the Reports relate specifically to conditions existing at CRR, it is reasonable to expect that their disclosure would allow other duty holders on large-scale projects to generate similar reports to avoid scrutiny by WHSQ, thereby circumventing a system or procedure established to protect workers. I do not consider there is merit to this expectation, which I regard as remote and speculative, rather than one for which real and substantial grounds exist.

Finding

94. For the reasons explained, I am not satisfied that requirements for exemption under either schedule 3, section 10(1)(i) are met by disclosure of the Reports. I therefore find that the Reports do not comprise exempt information under this provision.

Application of schedule 3, sections 10(1)(a), 10(1)(e) and 10(1)(f) of the RTI Act

95. Information will be exempt under schedule 3, section 10(1)(a) if its disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case.

96. Information will be exempt under schedule 3, section 10(1)(e) if its disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case.

97. Information will be exempt under schedule 3, section 10(1)(f) if its disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law).

Discussion

98. It is convenient to deal briefly with these three exemption provisions together, given the circumstances under which the JV raised their application.

99. In her submission dated 17 May 2024, the applicant, in discussing public interest factors that she considered weighed in favour of disclosure of the Reports, submitted that disclosure could reasonably be expected to contribute to the enforcement of the criminal law.[64] As the JV and CRRDA were objecting to disclosure of the Reports, the applicant stated that she *'construe[d] that the documentation requested reveals significant exposures to respirable dust and RCS to workers on the Cross River Rail Project'*. She submitted that this could possibly give rise to industrial manslaughter charges in the future.

100. In response to this submission, and to what the JV regarded as the applicant's prejudicial view of CRR, the JV raised the application of schedule 3, sections 10(1)(a), 10(1)(e) and 10(1)(f).

101. For the sake of completeness, I record my finding, firstly, that there are no reasonable grounds for expecting that disclosure of the Reports could reasonably be expected to give rise to criminal proceedings or to otherwise contribute to the enforcement of the criminal law. The mere fact that the JV and CRRDA object to disclosure of the Reports, (on a variety of grounds, including confidentiality) does not provide a reasonable basis for assuming a negative view about the contents of the Reports and what they may reveal, let alone giving rise to a reasonably based assertion that disclosure of the contents may give rise to criminal proceedings at some point in the future. Such an assertion by the applicant is speculative.

102. It follows, then, that I also am not satisfied that disclosure of the Reports could reasonably be expected to result in the requisite prejudicial effects under any of

[64] Schedule 4, part 2, item 18 of the RTI Act.

sections 10(1)(a), 10(1)(e) or 10(1)(f). There is no evidence before me to support a finding that disclosure of the Reports could reasonably be expected to prejudice:

- any investigation of a contravention or possible contravention of the law; or
- any person's fair trial or the impartial adjudication of any case; or
- the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.

103. Again, I regard such assertions as speculative, unsupported by evidence or cogent reasoning.

Finding

104. For the reasons explained, I am not satisfied that requirements for exemption under any of schedule 3, sections 10(1)(a), 10(1)(e) or 10(1)(f) are met by disclosure of the Reports. I therefore find that the Reports do not comprise exempt information under these provisions.

Public interest balancing test - relevant law

105. Under the RTI Act, access to information may be refused where disclosure would, on balance, be contrary to the public interest.[65] The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest[66] and explains the steps that a decision-maker must take in deciding the public interest as follows:[67]

a) identify any irrelevant factors and disregard them
b) identify relevant public interest factors favouring disclosure and nondisclosure
c) balance the relevant factors favouring disclosure and nondisclosure; and
d) decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

106. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have considered these lists,[68] together with all other relevant information, in reaching my decision. I have kept in mind the RTI Act's pro-disclosure bias[69] and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.[70]

107. I acknowledge that, early in the review, OIC expressed a preliminary view to the applicant that disclosure of the Reports would, on balance, be contrary to the public interest, and gave preliminary weighting to the various factors favouring disclosure and nondisclosure. The applicant did not accept that view and provided further

[65] Section 47(3)(b) of the RTI Act. The '*public interest*' '*…is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals*': *Director of Public Prosecutions v Smith* (1991) 1 VR 63. The concept refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.
[66] Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and, therefore, other factors may also be relevant in a particular case.
[67] Section 49(3) of the RTI Act.
[68] I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, and the relevant factors that I have identified are discussed below.
[69] Section 44 of the RTI Act.
[70] Section 47(2) of the RTI Act.

submissions relevant to the application of the public interest balancing test, as did the respondents, who urged to me follow the preliminary view and the relevant weightings. It is important to reiterate that a preliminary view expressed during the course of a review is genuinely preliminary in nature. It is not a decision, but is designed to assist in attempting to informally resolve a matter, or to provide any party adversely affected an opportunity to put forward submissions in support of their views. Any additional, relevant information that is provided by the parties to a review that supports their case will be considered in reaching a final decision. As such, it is open to me, as the decision maker, to depart from the previously expressed preliminary view after a full consideration of all material before me at the time of making my decision. In reaching my decision, I am satisfied that all parties have been afforded procedural fairness in terms of being given an opportunity to provide submissions in relation to the issues for determination, and to know and respond to, the submissions made by each of the other parties.

Relevant public interest factors

108. The public interest factors favouring disclosure that are relied upon by the applicant are as follows:

    a) disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability[71]
    b) disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest[72]
    c) disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds[73]
    d) disclosure could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety[74]
    e) disclosure could reasonably be expected to contribute to the enforcement of the criminal law;[75] and
    f) disclosure could reasonably be expected to contribute to innovation and the facilitation of research.[76]

109. The public interest nondisclosure and harm factors that are relied upon by OIR, the JV and CRRDA are as follows:

    a) disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities[77]
    b) disclosure could reasonably be expected to cause a public interest harm because it would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government[78]
    c) disclosure could reasonably be expected to cause a public interest harm because it would disclose personal information of a person[79]

[71] Schedule 4, part 2, item 1 of the RTI Act.
[72] Schedule 4, part 2, item 2 of the RTI Act.
[73] Schedule 4, part 2, item 4 of the RTI Act.
[74] Schedule 4, part 2, item 14 of the RTI Act.
[75] Schedule 4, part 2, item 18 of the RTI Act.
[76] Schedule 2, part 2, item 19 of the RTI Act.
[77] Schedule 4, part 3, item 2 of the RTI Act.
[78] Schedule 4, part 4, section 7(1)(c) of the RTI Act.
[79] Schedule 4, part 4, section 6 of the RTI Act. 'Personal information' is defined in schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**): *'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'*

d) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy[80]
e) disclosure could reasonably be expected to impede the administration of justice generally, including procedural fairness[81]
f) disclosure could reasonably be expected to prejudice the economy of the State[82]
g) disclosure could reasonably be expected to cause a public interest harm because it could have a substantial adverse effect on the ability of government to manage the economy of the State[83]
h) disclosure could reasonably be expected to cause a public interest harm because it could have a substantial adverse effect on the financial or property interests of the State[84]
i) disclosure of the information is prohibited by an Act;[85] and
j) disclosure could reasonably be expected to prejudice the proper performance of CRRDA's performance of its statutory powers and functions.[86]

110. Each of the factors contains the phrase *'could reasonably be expected to'*, the meaning of which I have discussed at paragraph 73 above.

Public interest factors favouring disclosure

Irrelevant factors

111. In its initial submission to OIR,[87] the JV acknowledged that there were public interest factors that favoured disclosure of the Reports, but argued that there were *'critical limitations'* that affected the factors and that may cause them to be *'redundant'*:

> *The documents are a brief snapshot of a point in time, and does* [sic] *not reflect a 'full picture' for the following reasons:*
>
> *• the samples taken by the Consultant are limited to a single day, time, and duration (in minutes) for which the Consultant was present at CBGU D&C JV's site;*
> *• the samples taken by the Consultant are limited to high-risk job roles and segments where the likelihood of exposure would be high;*
> *• the documents do not cover all CBGU D&C JV's sites for the Project;*
> *• the date range of the documents does not reflect the commencement of the Project, or ongoing nature of air monitoring on the Project.*
>
> *Given the critical limitations set out above, it is difficult to reconcile how disclosure of the documents could reasonably be expected to promote open discussion of public affairs, or advance fair treatment of entities, or any other reason other than the purpose for which the*

[80] Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others (paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56).
[81] Schedule 4, part 3, item 8 of the RTI Act.
[82] Schedule 4, part 3, item 12 of the RTI Act.
[83] Schedule 4, part 4, section 9(1)(a) of the RTI Act.
[84] Schedule 4, part 4, section 10 of the RTI Act.
[85] Schedule 4, part 3, item 22 of the RTI Act.
[86] Additional nondisclosure factor.
[87] Dated 8 November 2023.

documents came into existence, which is to inform [the JV] *in its discharge of its obligations as a PCBU underwork health and safety laws.*

112. I do not accept that these factors can properly be regarded as 'limitations' on disclosure, nor that they impact my consideration of the weight to be afforded to public interest factors favouring disclosure of the Reports. The circumstances under which the Reports were prepared, and the nature of the information they contain, is evident on the face of the Reports. I consider that this argument by the JV is akin to submitting that disclosure of the Reports could reasonably be expected to result in the applicant misinterpreting or misunderstanding the Reports, which is a factor explicitly recognised as irrelevant in deciding the public interest.[88] I have therefore not taken this submission by the JV into account in considering the application of the public interest balancing test.

Enforcement of the criminal law

113. I am not satisfied that factor e) in paragraph 108 applies to the Reports. I have explained in paragraph 101 above why I am not satisfied that there are any reasonable grounds for expecting that disclosure of the Reports could contribute to the enforcement of the criminal law. As noted, the applicant has presumed that, simply because the JV and CRRDA object to disclosure of the Reports, the Reports must reveal *'… significant exposures to respirable dust and RCS to workers …'* which could potentially lead to charges of industrial manslaughter.[89] I find that the applicant's contention in that regard is both speculative and remote, rather than an expectation for which real and substantial grounds exist.

Expenditure of public funds

114. As to factor c) in paragraph 108, I am also not satisfied that there are reasonable grounds for expecting that disclosure of the Reports would ensure oversight of the expenditure of public funds. The applicant raised this factor in response to the argument that disclosure of the Reports could reasonably be expected to prejudice the State's economy by causing further industrial action and resultant delays in construction. She argued as follows:

> *As previously mentioned, the Cross River Rail project is the beneficiary of $6 billion of State Government funding. The Queensland Procurement Policy is the government's overarching policy for the procurement of goods and services. That Policy requires governments to apply "Best Practice Principles" for workplace health and safety systems and standards. These principles aim to ensure safe workplaces through the application of the best practice principles for people engaged on major state government projects.*
>
> *That document states:*
>
> > "Ensuring quality, safe workplaces through the highest possible standards of workplace health and safety, engaging appropriate numbers of trainees and apprentices, and best practice industrial relations supports delivery of projects on time and on budget."
>
> *I note in your letter that an* "adverse effect on the State's economy" *was a factor that was considered for non-disclosure. I submit that if the CCRDA are looking purely at the costs of delays, then they have failed to understand their role in applying best practice principles to ensure safe workplaces on the Project. There is therefore a risk of the ineffective oversight of public funds.*[90]

[88] Schedule 4, part 1, item 2 of the RTI Act.
[89] Submission dated 17 May 2024.
[90] Submission dated 17 May 2024 (excluding footnotes).

115. The Reports reveal nothing about public expenditure and nor would their disclosure enable any judgment to be made about the effect on CRR's costings or budget of the application or otherwise of best practice principles to ensure a safe workplace. Again, I find the applicant's assertion to be speculative and remote, rather than one for which real and substantial grounds exist.

Government accountability/transparency/inform debate

116. Disclosure factors a) and b) in paragraph 108 are concerned with government accountability and transparency, enhancing the ability of the public to participate meaningfully in government affairs, and informing debate. The respondents argue that these factors should be given only low weight when balancing the public interest because the Reports do not evidence any government workings or decision-making, and their disclosure therefore would not substantially advance the public interest in government accountability and transparency.

117. In making this argument, the respondents relied upon OIC's decision in *Australian Broadcasting Corporation and Department of Education (Office of Industrial Relations); A Stone Cutting Business (Third Party)*[91] wherein the Information Commissioner decided that disclosure of the particular information in issue (which was described as information about private sector employees and the operations of private sector businesses) could not reasonably be expected to further advance the government accountability and transparency factors.

118. The applicant, however, argued that disclosure of the Reports would allow the public to assess whether reasonable steps were put in place by the JV to ensure that risks to health and safety caused by RCS exposure were eliminated or minimised, and thereby permit scrutiny of whether WHSQ and CRRDA properly discharged their statutory obligations to monitor and oversee the appropriateness and effectiveness of the safety measures put in place:

> *Monitoring reports convey information on the level of exposure to respirable dust and respirable crystalline silica (RCS) to workers. They demonstrate in black and white if a worker is protected from exposure or if non-compliance with Workplace Exposure Standards (WES), and hence, health and safety regulation1 has occurred. If air monitoring reports demonstrate non-compliance with the WES, it puts into question the actions of the employer* and *the government client (Cross River Rail Delivery Authority (CRRDA))* and *the effectiveness of the health and safety regulator.*
> *…*
> *The CCDRA has an important role in ensuring that Government-funds are appropriately spent. The CCDRA submits that,* "Safety is our number one priority"*. The people of Queensland would expect that the CCDRA understands their due diligence obligations under the Work Health and Safety Act*. …
>
> *It is expected that officers have taken reasonable steps to ensure that appropriate resources and processes to eliminate or minimise risks to health and safety have been put in place so that workers who service the Cross River Rail project are not put at risk of developing dust diseases.*
>
> *Indeed, CRRDA state the following in their Annual Report:*
>
> > "As at the end of the 2022-23 financial year, other key project achievements included:

[91] [2021] QICmr 14 (23 March 2021) (***Stone Cutting Business***).

> – ensuring the highest levels of safety were maintained across each of the 17 project worksites"
>
> *The disclosure of the results of air monitoring for respirable dust and RCS will enable the public to understand if this statement was true. The disclosure of this information directly relates to the transparency of Government in the statements made in public documents. This is in the public interest*.[92]
> …

119. The JV rejected this argument, submitting that:

> *The disclosure of the information cannot be said to enhance accountability or transparency of government other than on a basis that relies on inferential and speculative reasoning.*[93]

120. I accept the applicant's arguments. The Reports indicate the safety measures that were put in place to prevent or minimise the exposure of tunnel works to RCS, as well as the results of the testing conducted on relevant workers. I am satisfied that disclosure of the Reports could therefore reasonably be expected not only to permit scrutiny of the effectiveness of the safety measures that were employed, but also to promote open discussion and informed debate about this important issue, given the serious health effects that may be suffered through exposure to RCS.

121. The seriousness of this health and safety issue is evident by the fact that the Coordinator-General imposed on CRRDA, as CRR's proponent, a specific condition relating to air quality, in which air quality criteria and goals were set, and an air quality management plan was required.[94]

122. I consider that disclosure of the Reports therefore could reasonably be expected, in turn, to enhance the accountability and transparency of WHSQ and CRRDA, as government/statutory entities with obligations to monitor and oversee the results of the JV's health and safety measures, and to require further action to be taken, if necessary. CRRDA has acknowledged that it has overarching responsibility for the delivery of CRR on behalf of the government and the people of Queensland. I am satisfied that this responsibility includes ensuring that the JV utilises best practice health and safety measures for its workers. As the applicant has noted, CRRDA has publicly asserted that the safety of CRR is its number one priority in numerous statements contained in its Annual Reports. In addition to those extracted by the applicant, I note the following statements contained in its 2021-2022 and 2022-23 Annual Reports:

> *The 2021-22 financial year marks the Cross River Rail project's fifth year of operations and third year of major construction. The project now has 15 active worksites, and the Cross River Rail Delivery Authority has maintained its focus on safety and delivery.*[95]
> *…*
> *As at the end of the 2021-22 financial year, other key project achievements included:*
>
> • ***managing the compliance of contractors in relation to****:*
>
> *– ensuring the highest levels of safety were maintained across each of the 15 project worksites. …*[96]

[92] Submission dated 17 May 2024.
[93] Submission dated 18 June 2024.
[94] Cross River Rail: *Project-wide imposed conditions and recommendations July 2024* <https://www.statedevelopment.qld.gov.au/__data/assets/pdf_file/0029/93575/cross-river-rail-project-wide-imposed-conditions-and-recommendations-july-2024.pdf>, accessed 5 November 2024.
[95] CRRDA Annual Report 2021-2022, <https://cross-river-rail.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2022/11/11091439/5722T1356-D2BA.pdf>, at page 5, accessed 31 October 2024.
[96] ibid, at page 8, accessed 31 October 2024.

[Emphasis added]

…

> *While the project maintains an overall strong safety record, an incident involving a worker falling from height at one of the sites in July 2023 is a reminder that we must never be complacent. It is important that safety remains the project's single most important priority and that all possible measures are taken to ensure there is ongoing vigilance across all project sites.*[97]

123. In the report by the Parliamentary Committee inquiry into occupational respirable dust issues published in 2017,[98] in which WHSQ provided a submission concerning dust exposure and safety measures employed on tunnelling projects completed in Queensland to that point in time, the committee recognised the important role played by WHSQ in monitoring and enforcing the WHS Act, and its obligation to ensure appropriate management of respirable dust hazards over time.[99] OIR was reported as submitting as follows to the inquiry in relation to future tunnelling projects in Queensland:[100]

> *Over the past decade, WHSQ has learnt that the key to maintaining best practice safety standards in tunnelling is pre-project planning and ongoing consultation with industry and experts. The objective on any tunnelling project should be to reduce the respirable dust in the air to a point that mandatory RPE is not required.*
>
> *... getting it right at the front of those projects with the right code will ensure that people will not be exposed to the risk. That is the key from our point of view…*
>
> *As we did in relation to the other tunnels, we will be meeting with the contractors prior to and during the planning implementation stage, obviously advising them about our expectations in relation to the requirements and then looking at their planning in relation to ventilation and making clear any requirements that we believe would ensure it meets best practice.*

124. It is only through disclosure of the Reports that the public will be in a position to know what testing data was commissioned and made available[101] by the JV, and what it showed. This information will then provide the public with the opportunity to scrutinise whether WHSQ and CRRDA properly discharged their respective obligations in respect of monitoring and overseeing/managing this particular aspect of the project's safety, and to assess whether the safety measures used met best practice, or whether any further action could or should have been taken by either entity to improve safety standards or to otherwise mitigate the risk. In that manner, I am satisfied that disclosure of the Reports could reasonably be expected to enhance, to a significant degree, the accountability and transparency of government regarding the delivery of CRR and the steps taken to ensure the safety of workers.

125. As to the *Stone Cutting Business* decision, I would simply note that each case turns on its own facts and circumstances, and on the particular nature of the information in issue. In that case, the information in question was described as information about private sector employees and the operations of a private sector business. In contrast, while the JV may be comprised of a group of private companies, it has been contracted by CRRDA, on behalf of the Queensland government and the people of Queensland, to construct a $6 billion, publicly funded, infrastructure project that involves thousands of

[97] CRRDA Annual Report 2022-2023, <https://documents.parliament.qld.gov.au/tp/2023/5723T1527-302C.pdf>, at page 4, accessed 31 October 2024.
[98] See footnote 44.
[99] At section 7.4.
[100] At pages 75-76.
[101] I note that CRRDA stated in its submission to OIR dated 26 October 2023 that, until it was consulted by OIR in the context of OIR's processing of the applicant's access application, CRRDA had not been provided with copies of the Reports.

workers. As I have already noted, those workers are, in effect, employed by the people of Queensland and are owed a duty of care that is discharged on behalf of the people of Queensland by CRRDA, and is subject to monitoring and enforcement by WHSQ. I am satisfied that there is a significant public interest in the accountability and transparency of both of these entities that would be enhanced by disclosure of the Reports. I therefore afford significant weight to public interest factors a) and b) in paragraph 108 that favour disclosure.

Reveal environmental and health risks, and facilitate research

126. During the course of the review, OIC expressed the preliminary view that factors d) and f) in paragraph 108 were deserving of being afforded significant weight in favour of disclosure of the Reports. I note that none of the respondents sought to challenge this weighting in their responses. I will therefore simply affirm my view that disclosure of the Reports could reasonably be expected to contribute to important debate about, as well as important research into, the health and safety of tunnel construction workers, and the effects on their health from exposure to RCS in the workplace. I also accept that disclosure of the Reports could reasonably be expected to reveal health risks to tunnel construction workers. I afford both of these factors significant weight in the public interest balancing test.

Summary

127. In summary, I find as follows in respect of the weighting to be given to the public interest factors favouring disclosure that are listed in paragraph 108 above:

- factors a), b), d) and f) - significant weight; and
- factors c) and e) - do not apply.

Factors favouring nondisclosure

Irrelevant factors

128. The applicant argued that she had received access to air monitoring reports for other tunnelling projects undertaken in other Australian states and territories and that none of the prejudicial or adverse effects identified by the respondents in their submissions had occurred as a result of that access. There were therefore no reasonable grounds for expecting that these effects would follow from disclosure of the Reports.

129. I acknowledge the applicant's submission, however, I do not consider it can be taken into account in assessing the weight to be afforded to the factors favouring nondisclosure of the Reports in the particular circumstances of this review. What may or may not have occurred as a result of disclosure of other information under other access regimes, and in respect of other projects, is not relevant to my obligation under the RTI Act to assess the reasonableness or otherwise of the effects that the respondents argue will flow from disclosing the Reports, in the context of the specific circumstances that exist in this review.

Prejudice/adverse effect on business or commercial affairs/prejudice to future supply of similar information

130. Factors a) and b) in paragraph 109 are concerned with whether disclosure of information could reasonably be expected to:

- prejudice the private, business, professional, commercial or financial affairs of entities; and/or
- cause a public interest harm through disclosure of information concerning the business, professional, commercial or financial affairs of an agency or another person, where disclosure is expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.

131. The purpose of these nondisclosure/harm factors is to balance the main objects of the RTI Act (i.e., promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for the protection from disclosure of commercially sensitive information, and its future supply to government.[102]

132. The phrase *'adverse effect'* means an effect that is *'real'*, *'actual'*, or *'having substance, not illusory'*.[103]

133. Both the JV and CRRDA argue that disclosure of the Reports could reasonably be expected to cause prejudice to, or to have an adverse effect upon, their business or commercial affairs. CRRDA argues that, because, under the CRRDA Act, it is required to carry out its statutory functions on a commercial basis, it is capable of having business or commercial affairs.

134. It is clear that CRRDA is not an 'agency' for the purposes of the RTI Act, except when it is carrying out its community service obligations.[104] It can be regarded as an 'entity' for the purposes of the prejudice factor in schedule 4, part 3, item 2 of the RTI Act. While it is not an agency for the purposes of the harm factor in schedule 4, part 4, section 7(1)(c)(i) of the RTI Act, it arguably falls within the meaning of '*another person'*.[105]

135. The Information Commissioner has previously decided that the common link between the words *'business'*, *'professional'*, *'commercial'* and *'financial'* is to activities carried on for the purpose of generating income or profits, and would apply to a government entity only to the extent that the entity is engaged in a business undertaking carried on for the purpose of generating income or profits, or is otherwise involved in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits.[106]

136. I do not understand CRRDA to be concerned with generating income or profits. Its primary role is to plan, carry out, promote and coordinate activities to facilitate the efficient delivery of CRR for the government.

137. However, even accepting that CRRDA is capable of having business or commercial affairs, it is still necessary to establish that there are reasonable grounds for expecting that disclosure of the Reports will have the requisite prejudicial or adverse effect on those affairs.

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[102] Ca*nnon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (***Cannon***).
[103] *Cairns Port Authority and Department of Lands; Cairns Shelfco No.16 Pty Ltd (Third Party)* (1994) 1 QAR 663 at [150] (***Cairns Port Authority***).
[104] See sections 12 and 17, and schedule 2, part 2, item 22, of the RTI Act.
[105] The Information Commissioner has adopted the definition of the word '*person*' from the *Acts Interpretation Act 1954* (Qld) to include both '*an individual and a corporation*'. *'Corporation'* is defined in the *Acts Interpretation Act* as including a *'body politic or corporate'*. This term is used to include references to bodies invested with powers and duties of government: https://thelawdictionary.org/body-politic/ (accessed 18.11.24).
[106] *Cannon* at [81].

138. In its consultation response to OIR,[107] CRRDA argued as follows:

- a failure to manage CRR commercially would be *'inconsistent and potentially be a breach of a statutory obligation'*
- disclosure of the technical information contained in the Reports *'could have an adverse impact on and inform sensitive commercial issues, such as relationships with other contractors and third parties engaged in the construction of the Project';* and
- it is considered *'unlikely that any entity, operating in commercial settings, would consider releasing this type of information.'*

139. CRRDA concluded by simply stating that, having regard to these matters, its business or commercial affairs could reasonably be expected to be prejudiced by disclosure of the Reports. It provided no other detail in support of these assertions.

140. As to the last point, it is overly simplistic to equate the JV or CRRDA with any ordinary entity operating in a competitive commercial setting that can choose whether or not to release information concerning its private business operations. Those are not the circumstances that arise for consideration here, where the operation in question is a major piece of public infrastructure. But I would also note that any entity that operates as a PCBU and is subject to the WHS Act, regardless of whether or not it operates in a commercial setting, is subject to oversight and monitoring by WHSQ as regulator and may be required to provide information to WHSQ in that context. As to the other two points raised by CRRDA, neither provides any detail that explains precisely how disclosure of the Reports could reasonably be expected to result in a failure to *'manage CRR on commercial terms'*, or to negatively impact relationships with other contractors or third parties engaged in the construction of CRR.

141. In its submission to OIC,[108] CRRDA relied upon the submissions provided to OIC by the JV to the effect that disclosure of the Reports could reasonably be expected to result in further industrial action and work disruptions, thereby causing prejudice to the JV's ability to progress CRR as quickly and efficiently as possible, with an associated adverse effect on its business or commercial affairs. This in turn, argued CRRDA, could reasonably be expected to frustrate the ability of CRRDA to *'carry out its functions as a commercial enterprise'*.

142. In its submission to OIC dated 22 April 2024, the JV argued that disclosure of the Reports could reasonably be expected to:

> *(i) cause significant reputational, operational and financial damage to our parent company, our financiers, and our business partners;*
> *(ii) have an adverse effect on our reputation as an employer and more widely our business operations;*
> *(iii) prejudice our ability to effectively engage in our own internal reviews and investigations into matters involving dust and respirable crystalline silica-related issues, and any current and future external review and litigation proceedings; and*
> *(iv) impact upon our future pipeline of construction projects (loss of business and loss of profits);*
> *(v) impact upon our business relationships with our stakeholders within the industry;*
> *(vi) impact on our ability to attract and retain new employees, associates, and contractors in order to deliver the Project for the State of Queensland.*

[107] Dated 26 October 2023.
[108] Dated 14 June 2024.

143. The JV simply listed these possible effects. It did not provide any explanation as to precisely how it contended that disclosure of the Reports could reasonably be expected to have any of these effects.

144. In its second submission dated 18 June 2024, the JV briefly reiterated its argument that it was reasonable to expect that disclosure of the Reports under the RTI Act would result in the Reports entering the public domain, which in turn could reasonably be expected to result in industrial action and/or work disruptions.[109]

145. In its decision under review, OIR decided that disclosure of the Reports could reasonably be expected to cause competitive harm to the JV. It found that the information related to the business, commercial and financial affairs of the JV and was commercially sensitive in nature. It provided no further detail as to how disclosure of the information contained in the Reports could reasonably be expected to cause competitive harm to the JV, other than relying upon the finding in the *Stone Cutting Business* decision that release of information of a similar nature could reasonably be expected to prejudice or adversely affect the business and commercial affairs of the relevant business.

146. In terms of the *Stone Cutting Business* decision, I have already noted that each case turns on its own particular facts and circumstances, and upon the particular nature of the information in issue and the context in which it appears. The information in issue in that case would not appear, from its description in the decision, to equate readily to the air monitoring data contained in the Reports, and nor, in terms of assessing the potential for competitive harm, do I consider that any fair comparison could be made between the business or commercial context in which the JV operates in delivering CRR, and the business or commercial context in which a private entity that manufactures stone benchtops operates.

147. Having assessed all of the submissions provided by the respondent parties, I am not satisfied that the respondents have discharged the onus upon them of establishing that reasonable grounds exist for expecting that the prejudicial/adverse effects identified in paragraphs 138 and 142 above will follow from disclosure of the Reports. These are simply assertions of a very general nature and no explanation has been provided as to how disclosure of the specific information contained in the Reports could reasonably be expected to have the asserted effects. Similarly, I do not accept OIR's assertion in its decision that disclosure of the Reports could reasonably be expected to cause the JV competitive harm. Again, no detail has been provided as to the nature of the competitive harm that would result from disclosure of the data contained in the Reports, or the context in which it could reasonably be expected to occur.

148. Turning to the submission of the respondents that disclosure could reasonably be expected to result in further industrial action at CRR sites, with a resultant prejudicial or adverse effect on the ability of the JV and CRRDA to complete and deliver CRR in a timely and cost effective manner, I accept, as discussed at paragraphs 79-80 above, that CRR has been, and continues to be,[110] subject to industrial action. I also accept that it is reasonable to expect that industrial action that takes the form of strikes and work stoppages may adversely impact the business and commercial affairs of the JV

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[109] The JV was refuting the applicant's submission that a reliance by the JV upon the possibility of disruptive industrial activity suggested that it was reasonable to expect that the Reports would be disclosed by her to a third party for 'mischievous' reasons, which she claimed was an irrelevant factor under schedule 4, part 1, item 3 of the RTI Act.

[110] *CFMEU workers not striking, just scared* <https://www.afr.com/work-and-careers/workplace/cfmeu-workers-not-striking-just-scared-umpire-20241025-p5kl8n>; *What happens if you cross a CFMEU picket line* <*https://www.afr.com/work-and-careers/workplace/what-happens-if-you-cross-a-cfmeu-picket-line-20240718-p5just*>, accessed 31 October 2024.

and CRRDA (accepting, for the purpose of argument, that CRRDA in fact has business or commercial affairs).

149. Again, however, the issue to be assessed is the reasonableness of expecting that these prejudicial or adverse effects will result from disclosure of the Reports: that is, the reasonable likelihood of industrial action, in the form of strikes or work stoppages, occurring as a direct result of disclosure of the Reports under the RTI Act. Taking account of the factors I have discussed at paragraph 82 above, namely:

    - the fact that the tunnelling phase of the CRR project concluded in December 2021
    - the data contained in the Reports concerns circumstances existing in 2020 and 2021; and
    - the contents of the data,

    I consider that the likelihood is low. Furthermore, there may indeed also be some merit to the argument that the likelihood is low because disclosure of the Reports would, in fact, enhance the business affairs and reputation of the JV, and reflect positively on the efforts of the JV to minimise health and safety risks to its workforce.[111]

150. The applicant argued that there can be no reasonable expectation of strikes or work stoppages resulting from disclosure of the Reports because she does not anticipate being in a position to publish her research until 2026, at which time CRR is expected to be completed. However, while that may indeed be the applicant's intention, I must take account of the fact that there are no restrictions under the RTI Act upon what a person may do with information released under the RTI Act, including the possibility of further publication and dissemination, at any time.[112]

151. Finally, it is clear that industrial action is currently occurring on CRR sites about a variety of unrelated issues. Given both the age and the nature of the data contained in the Reports, I am not satisfied that there are reasonable grounds for expecting that disclosure of the Reports would significantly prolong or exacerbate the already existing industrial action.

152. For these reasons, I assess the extent of the prejudice or adverse effect on the business or commercial affairs of the JV and CRRDA that could reasonably be expected to result directly from disclosure of the Reports, as low to moderate.

153. I should also note that, in respect of the alternate requirement in the harm factor in schedule 4, part 4, section 7(1)(c)(ii) – that disclosure of the Reports could reasonably be expected to prejudice the future supply to government of this type of information – I find that only low weight should be afforded to this element of the factor. In doing so, I adopt the comments made in the *Ardent Leisure* decision, which involved the supply of information concerning ride safety to WHSQ by the Dreamworld theme park:

    > *Dreamworld submits that it has* 'forged a highly productive and respectful relationship, characterised by open and unrestricted information sharing' *with WSHQ and disclosure of the information in issue would damage this relationship. Dreamworld has also indicated that since this particular access application was made, it has restricted its cooperation with WHSQ* 'in order to protect our documents from non-meritorious RTI applicants'.

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[111] *Ardent Leisure* at [61].
[112] As Judicial Member McGill SC of QCAT observed '… *the effect of the…* [RTI Act] *is that, once information has been disclosed, it comes under the control of the person to whom it has been disclosed. 'There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination.*': *FLK v Information Commissioner* [2021] QCATA 46 at [17].

As noted above, the WHS Act confers various powers on inspectors to compel the production of documents and information. As the RTI Commissioner noted in [Nine Network Australia Pty Ltd and Department of Justice and Attorney-General 7(Unreported, Queensland Information Commissioner, 14 February 2012):

> *75.… while a cooperative relationship with industry participants may in some circumstances be desirable, it is not necessary to ensure the protections enshrined in the WHS Act are maintained.*
>
> *76. Ride operators are required to comply with the safety standards set out in the WHS Act or face the penalties set out in that Act. WHSQ in turn is charged with upholding that scheme. This is not a consensual or cooperative regime. Rather, it is a mandatory framework that ultimately demands compliance on the part of industry participants.*

While I understand there is some risk in Dreamworld being less forthcoming in providing information voluntarily, on an informal basis, to WHSQ in the future, I do not accept that Dreamworld can deny any level of cooperation with WHSQ given the mandatory compliance framework set up under the WHS Act, and also in view of the applicable penalty provisions. For these reasons, I am not satisfied that disclosure could reasonably be expected to prejudice the flow of information to WHSQ to any significant extent. …[113]

Personal information/privacy

154. As noted at paragraph 17 above, the applicant has indicated that she does not seek access to the names of any individual workers contained in the Reports who were subject to air quality monitoring, nor to the names, signatures and contact details etc of any individual involved in requesting, administering, or reporting on, the testing.[114]

155. The JV and CRRDA submit that, even though the applicant does not seek access to the name of any worker contained in the Report, it is nevertheless reasonably possible to identify such workers through details of the dates/shifts when testing took place, together with a description of the job classification/role of the worker. They therefore argue that disclosure of the de-identified Reports would nevertheless disclose the personal information of individuals other than the applicant, with a resultant prejudice to the protection of those individuals' right to privacy.

156. In its submission to OIR,[115] the JV argued as follows:

> *The documents contain both personal information and employment information and, if released, would enable employees to be identified which could lead to those employees being targeted by the media, or third party organisations. Those employees have no way of knowing their personal information would be disclosed in such a manner that would lead them to become known to the media, third party organisations, or the community at large, and would be prejudicial to their rights to privacy.*

157. The applicant responded as follows:[116]

> *When air monitoring data is reported, basic information is collected to support the context of those measurements. This includes the broad occupation, which for example includes,* "tunneller"*,* "labourer"*, or* "shotcretor"*. There are more than 3,000 people working across the Cross River Rail project sites working several different work-shifts. The risk that an individual worker could somehow be identified from a single air measurement, given the large number of workers across many shifts, at best, is negligible.*

[113] At [56]-[58] (footnotes omitted).
[114] See footnote 13.
[115] Dated 8 November 2023.
[116] Submission dated 17 May 2024.

> *Data of this type was previously released as part of the Inquiry into Respirable Dust issues in 2017. No individual workers were identified from the release of that information.*

158. In its final submission,[117] the JV briefly reiterated its position that personal information of particular workers could be derived from the Reports even if the names of workers were redacted.

159. As noted in footnote 79, the definition of 'personal information' contained in schedule 5 of the RTI Act and section 12 of the IP Act requires the information to be about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

160. Having regard to the age of the Reports, the general nature of the description of the role/classification being performed at the time of testing, and the size of the CRR workforce, I accept the applicant's submission that the likelihood that the identity of any individual worker could reasonably be ascertained through disclosure of the Reports, is remote. It follows that I also regard as remote, the JV's contention that disclosure of the Reports could reasonably be expected to prejudice the protection of a worker's right to privacy because it could reasonably be expected to result in them being 'targeted' by the media, or by (un-named) 'third party organisations'.

161. For these reasons, I afford low weight to the nondisclosure/harm factors c) and d) in paragraph 109 concerned with protecting an individual's personal information and right to privacy.

Administration of justice

162. The JV raised the application of factor e) in paragraph 109 in its initial submission to OIR, but did not seek to expand upon it in the submissions it subsequently lodged during the course of the external review. In its submission to OIR, the JV contended as follows:

> [The JV] *submits the documents are not in the public interest as its disclosure could reasonably be expected to impede the administration of justice and procedural fairness in claims or litigation involving respirable dust or respirable crystalline silica.*
>
> *This reflects the approach taken by the Australian Information Commissioner (IC) in the decision of* 'Besser' and Department of Families, Housing, Community Services and Indigenous Affairs.*. In that whilst these reports contain certain findings in relation to respirable crystalline silica, in circumstances where these issues are still the subject of ongoing monitoring and investigation and in some cases litigation, there is a reasonable expectation that disclosure of this information at this time, would prejudice the further impartial consideration of these issues.*[118]

163. The JV has provided no evidence to indicate that there is ongoing monitoring or investigation of air quality testing on CRR, nor any current or reasonably anticipated legal proceedings in respect of the matters discussed in the Reports.

164. I am therefore not satisfied that the JV has provided sufficient evidence or other material to establish that there are reasonable grounds for expecting that disclosure of the Reports would impede the administration of justice generally, including procedural fairness.

[117] Dated 18 June 2024.
[118] Submission dated 8 November 2023.

Affecting State economy/adverse effect on the State's financial interests

165. Dealing first with the public interest harm factor that concerns a reasonable expectation of a substantial adverse effect to the financial or property interests of the State or an agency occurring through disclosure of the Reports, the JV argued as follows in its submission to OIR dated 8 November 2023:

> [The JV] *adds that for the reasons set out above, particularly in relation to lock-outs, strikes or other industrial action, targeted action against* [the JV's] *employees, and similar disturbances, could reasonably set back the delivery date for the Project. This in turn would directly affect the CRRDA's financial and property interests as the statutory body responsible for the delivery of the* cross river rail project*.*

166. I note that CRRDA itself has not made this submission, nor provided any material to support the JV's submission.

167. Noting the limited circumstances in which CRRDA is an agency for the purposes of the RTI Act, there is insufficient material before me to be satisfied that disclosure of the Reports could reasonably be expected to have a substantial effect on its financial interests. As to the financial interests of the State, the Information Commissioner has previously decided that providing financial assistance to infrastructure projects is a financial interest of the State.[119] It must then be established that disclosure of the requested information could reasonably be expected to have a substantial adverse effect on the State's financial interests, that is, an expectation for an effect that is reasonably based and that is *'grave, weighty, significant or serious'* in nature.[120]

168. The JV's argument in this regard hinges on its assertion that disclosure of the Reports could reasonably be expected to result in further industrial action on CRR sites, causing further delays in delivery of the project, and a resultant increase in the cost of the project.

169. I reiterate the finding I have made in paragraph 149 above. Given the factors discussed there, as well as the fact that some industrial action is reported to already be occurring on CRR sites, I am not satisfied that disclosure of the Reports could reasonably be expected to have an adverse effect on the State's financial interests that would be substantial in nature. The JV has not discharged its onus of establishing that there are reasonable grounds (as opposed to a mere assertion or speculation, unsupported by evidence or cogent reasoning) for expecting that this effect will follow from disclosure of the Reports. As such, I am not satisfied that this public interest harm factor applies to disclosure of the Reports.

170. I adopt the same reasoning in finding that I am not satisfied that disclosure of the Reports could reasonably be expected to cause a public interest harm by having a substantial adverse effect on the ability of government to manage the economy of the State. While I acknowledge the significant cost of CRR, it is, nevertheless, a single infrastructure project. In terms of an economy reported to be worth more than $503 billion in 2022-2023,[121] I am not satisfied that, even if it were reasonable to expect that disclosure of the Reports would exacerbate delays to the delivery of CRR, such delays and their attendant costs could substantially impact the ability of the Queensland government to manage the economy.

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[119] *Seeney, MP and Department of State Development; Berri Limited (Third Party)* (2004) 6 QAR 354.
[120] *Cairns Port Authority* at [150].
[121] *About the Queensland Economy - Queensland Treasury*, <https://www.treasury.qld.gov.au/queenslands-economy/about-the-queensland-economy/#:~:text=The%202024-25%20State%20Budget%C2%A0forecast%20Queenslands>, accessed 31 October 2024.

171. In terms of the prejudice factor contained in schedule 4, part 3, item 12 of the RTI Act, the possibility of some level of prejudice being caused to the State's economy through disclosure of the Reports was raised in OIC's letter to the applicant dated 30 April 2024. This was in recognition of media reports that CRR was expected to cost approximately $1 billion more than originally estimated, with completion delayed until early 2026.[122] It was noted to the applicant that it may be open to argue that further delays in delivering CRR could reasonably be expected to prejudice the State's economy, and impact the already heavy burden on taxpayers in contributing to funding of CRR.

172. In her response,[123] the applicant argued that it is the cost to government of the *'burden of disease'* that could reasonably be expected to prejudice the State's economy. I acknowledge the applicant's submission, however, it is not relevant to the requirements of the nondisclosure factor.

173. Taking account again of the factors listed in paragraph 149 above, I consider that, to the extent that disclosure of the Reports could reasonably be expected to have any prejudicial effect on the State's economy (through causing delays and an associated increase in the cost of delivering CRR), such prejudice would not be significant in the context of the overall economy. None of the respondents has provided submissions or other material to persuade me otherwise. I therefore afford this nondisclosure factor low weight.

Prohibited by an Act

174. I have discussed, at paragraphs 51-53 above, the operation of the confidentiality provision contained in section 271 of the WHS Act. Pursuant to that provision, I accept that the Reports are subject to a statutory obligation of confidence under the WHS Act that prevents their disclosure other than in the circumstances listed in section 271(3).

175. In considering the weight to be afforded to this public interest factor, it is relevant to note that, as regulator, WHSQ is entitled to access a wide range of information, some of which may be sensitive. Section 271 of the WHS Act is a standard confidentiality clause included in legislation of this type that permits the collection of potentially sensitive information by government. The purpose of such provisions is to prevent the indiscriminate disclosure of information that an agency officer may have access to in the course of discharging their duties. These provisions usually include standard exclusion clauses that permit disclosure of the information in certain circumstances.

176. Section 271 of the WHS Act must be balanced against the express intention of the RTI Act to override provisions in other Acts prohibiting the disclosure of information.[124] As I have already noted, Parliament did not see fit to include information obtained under the WHS Act in schedule 3, section 12 of the RTI Act, which specifically exempts information the disclosure of which is prohibited in the listed Acts.

177. Accordingly, while I accept that this factor applies to the Reports, I consider it warrants only moderate weight.

Prejudice the proper performance of CRRDA's functions

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[122] *'Queensland government reveals Cross River Rail cost blowout of $960 million, now not due to open til 2026'* <https://www.abc.net.au/news/2023-03-31/qld-cross-river-rail-cost-blowout-brisbane/102173588>, accessed 17 October 2024.
[123] Dated 17 May 2024.
[124] Section 6 of the RTI Act.

178. CRRDA raised the following argument as an additional factor weighing in favour of nondisclosure of the Reports:

> *As noted above:*
>
> *(a) the Delivery Authority is required to exercise and properly discharge a range of statutory functions which relate to delivering the Project and do soon* [sic] *a commercial basis; and*
>
> *(b) the release of information relating to activities related to the current construction phase of the Project and subject to commercial contracts could reasonably be expected to be inconsistent with the Delivery Authority's mandated obligations to discharge its functions on a commercial basis.*
>
> *It follows that the disclosure of the Consultation Documents could reasonably be expected to frustrate the capacity for the Delivery Authority to carry out its functions as a commercial enterprise which would be inconsistent with the Delivery Authority's statutory obligation prescribed under section 13 of the CRRDA Act.*
>
> *Additionally, by making the Delivery Authority exempt from the operation of the RTI Act except where it is carrying out community service obligations, the Queensland Parliament has clearly identified that there is a public interest harm in sensitive commercial information relating to the commercial activities of the Delivery Authority being released.*
>
> *On that basis, noting the above as an additional Factor Favouring Non-disclosure, the disclosure of the Consultation Documents would, on application of the Public Interest Test Exemption, be contrary to the public interest.*[125]

179. While CRRDA has described this argument as an additional nondisclosure factor, it is not immediately clear how it differs from CRRDA's argument that disclosure of the Reports could reasonably be expected to prejudice CRRDA's business or commercial affairs, which I have discussed in detail in paragraphs 130-152 above.

180. CRRDA has again emphasised the statutory requirement that it discharge its functions on a commercial basis, and argues that disclosure of the Reports would 'frustrate' this requirement as well as CRRDA's ability to act as a commercial enterprise. It also points to the fact that it is exempt from the operation of the RTI Act (except where it is carrying out community service obligations), indicating that Parliament identified a public interest harm in sensitive information relating to the commercial activities of CRRDA being released.

181. I have acknowledged above that CRRDA is listed in schedule 2, part 2, item 22 of the RTI Act as an entity to which the RTI Act does not apply except in relation to its community service obligations. However, it is important to note that schedule 2 exclusions are not document-based exclusions (unlike schedule 1 exclusions, which exempt certain types of documents from the RTI Act no matter who holds them). Regardless of CRRDA's status under the RTI Act, the Reports are in the possession of OIR, which is an agency subject to the RTI Act in relation to all of its functions. The Reports are therefore subject to the RTI Act and a determination is required to be made as to whether their disclosure would, on balance, be contrary to the public interest.

182. CRRDA has not explained how disclosure of the Reports could reasonably be expected to frustrate its capacity to carry out its functions as a commercial enterprise (again, I note that I have expressed doubt as to whether CRRDA can properly be

[125] Submission to OIR dated 26 October 2023.

regarded as having business or commercial affairs for the purposes of the RTI Act). As far as I am aware, CRRDA's various contracts and commercial arrangements with the private sector entities that are involved in building CRR remain in place. I cannot see how disclosure of the Reports would impact those arrangements and relationships, given that they are governed by contractual terms.

183. I am therefore not satisfied that CRRDA has provided sufficient evidence or other material to establish reasonable grounds for expecting that disclosure of the Reports would prejudice the proper performance of CRRDA's obligations under the CRRDA Act to deliver CRR on a commercial basis.

Summary

184. In summary, I find as follows in respect of the weighting to be given to the public interest nondisclosure and harm factors that are listed in paragraph 109 above:

- factors a) and b) - low to moderate weight
- factors c), d) and f) - low weight
- factor i) - moderate weight; and
- factors e), g), h) and j) - do not apply.

Balancing the public interest

185. Upon balancing the various factors favouring both disclosure and nondisclosure of the Reports, I am satisfied that those favouring disclosure outweigh those favouring nondisclosure, such that disclosure of the Reports would not, on balance, be contrary to the public interest. Therefore, access under the RTI Act may not be refused on that basis.

Miscellaneous issues

186. During the course of the review, the third and fourth parties raised a number of issues which I consider fall outside the jurisdiction of OIC under the RTI Act, or are otherwise irrelevant to the application of the provisions of the RTI Act to the Reports. I note them here simply for the sake of completeness.

The identity of the access applicant

187. In its submission dated 14 June 2024, provided in response to the applicant's submission dated 17 May 2024, CRRDA queried whether the applicant in the review was in fact Ms Cole, or the University of Sydney, Faculty of Medicine and Health. It stated that unless it was advised otherwise, it would *'assume that the submissions hold the authority of the University of Sydney and the views and positions set out in the submissions are those of the University of Sydney'*.

188. Although her correspondence is written on University of Sydney letterhead, the applicant made clear in her access application, and in her correspondence during the course of the review, that she was making the application in her individual capacity and for the purposes of a research study she is undertaking as a PhD candidate at the University of Sydney. There is nothing in the applicant's correspondence to suggest that the submissions she made were anything other than her personal views and arguments.

189. The point that CRRDA is seeking to make, in attempting to stamp the applicant's submissions with the authority of the University, is unclear to me. The issue appears to have been raised to reflect the gravity of CRRDA's concerns about the applicant's argument that disclosure of the Reports could reasonably be expected to contribute to the enforcement of the criminal law. I have explained above why I have dismissed this argument by the applicant as speculative and without merit.

190. However, in any event, the CRRDA's query has no relevance to my consideration of whether or not access to the Reports should be granted under the RTI Act.

Ethical concerns

191. In its submission dated 18 June 2024, the JV stated as follows:

> *Finally, we note that the Applicant has indicated that she seeks the relevant information in this case for the purpose of 'research'. We consider it important to point out that the* National Statement on Ethical Conduct in Human Research 2023*, which we understand applies to the Applicant, provides at page 17 [2.2.9] as follows:*
>
> No person should be subject to coercion or pressure in deciding whether to participate. Even where there is no overt coercion or pressure, consent might reflect deference to the researcher's perceived position of power, or to someone else's wishes. Here as always, a person should be included as a participant only if his or her consent is voluntary.
>
> *The Applicant has not sought consent from the* [JV]*. On the contrary, the Applicant's case for disclosure has included serious and unsubstantiated allegations.*
>
> *We understand that the Applicant's approach to requesting the relevant information may be viewed poorly by the institution facilitating the PhD candidacy.*

192. Again, this concern appears to have been prompted by the applicant's argument that disclosure of the Reports could reasonably be expected to contribute to the enforcement of the criminal law.

193. The applicant responded by arguing that she was entitled to seek access to the Reports by following the mandated processes for accessing government-held information enshrined in the RTI Act. She also noted that the Reports upon which she sought to base her research were an existing collection of data,[126] and that she did not seek to access identifiable personal information. The applicant confirmed that her approach to seeking access to the Reports had been discussed with the University's Human Research Ethics Committee, and supported by her PhD supervisor.

194. It does not appear that the JV seeks specifically to raise this issue as a factor favouring nondisclosure of the Reports. Rather, its concerns are focused on the way in which the applicant has sought access to the Reports and the fact that she has not sought the JV's consent.

195. As the applicant has noted, the RTI Act provides a lawful mechanism by which a person has a right to seek access to any information held by government. The applicant is entitled to avail herself of that right. Whether or not access may be granted to the requested information is governed by the considerations contained in the RTI Act. While section 37 of the RTI Act requires a third party such as the JV to be consulted if disclosure of the requested information could reasonably be expected to be

[126] I note that page 7 of the *National Statement on Ethical Conduct in Human Research 2023* provides that research includes *'accessing a person's information (in individually identifiable, re-identifiable or non-identifiable form) as part of an existing published or unpublished source or database'.*

of concern to them (and that has occurred in this case), their consent to disclosure is not required in order to give a decision granting access.

196. In determining whether access to the Reports may be granted under the RTI Act, I am required to apply the provisions of the RTI Act to decide whether OIR's decision refusing access should be affirmed, varied or set aside.[127] Whether or not the manner in which the applicant has sought access to the Reports, or the use to which the applicant intends to put the information contained in the Reports, would breach ethical standards outside of the RTI Act, are not matters that I have either the knowledge or jurisdiction to determine.

DECISION

197. For the reasons set out above, I set aside the decision of OIR under review. In substitution for it, I find that the Reports do not comprise exempt information under section 48 of the RTI Act, and nor would their disclosure, on balance, be contrary to the public interest under section 49 of the RTI Act. I therefore find that there are no grounds under the RTI Act to refuse access to the Reports.

198. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Stephanie Winson
Right to Information Commissioner

Date: 26 November 2024

[127] Section 110 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
13 December 2023	OIC received the application for external review. OIC requested preliminary information from OIR. OIC received preliminary information from OIR.
8 January 2024	OIC advised the parties that the application for review had been accepted. OIC requested copies of the documents in issue from OIR as well as any third party consultation correspondence.
24 January 2024	OIC received the requested information from OIR
7 March 2024	OIC sent consultation letters to three parties.
21 March - 22 April 2024	OIC received responses from the third and fourth parties.
30 April 2024	OIC expressed a preliminary view to the applicant.
17 May 2024	OIC received a submission from the applicant.
21 May 2024	OIC provided the respondents with a copy of the applicant's submission and requested submissions in response.
14 June 2024	OIC received a submission from CRRDA.
18 June 2024	OIC received a submission from the JV.
26 June 2024	OIC provided OIR with a copy of the JV's submission dated 18 June 2024 and requested that it address the issues raised by the JV. OIC provided the applicant with a copy of CRRDA's submission dated 14 June 2024.
19 July 2024	OIC received a partial submission from OIR.
1 August 2024	OIC received a complete submission from OIR. OIC provided a copy of OIR's submission to the JV and CRRDA. OIC provided the applicant with copies of the submissions from the JV and OIR.
22 August 2024	OIC received a final submission from the applicant.
27 August 2024	OIC provided the respondents with a copy of the applicant's submission.
6 November 2024	OIC confirmed with the applicant via telephone and email that she was not seeking access to any personal information contained in the Reports.