



Decision and Reasons for Decision

Citation:	<i>Consolidated Biodiesel Pty Ltd and Department of Energy and Public Works [2023] QICmr 51 (14 September 2023)</i>
Application Number:	317104
Applicant:	Consolidated Biodiesel Pty Ltd (ACN: 128 618 253)
Respondent:	Department of Energy and Public Works
Decision Date:	14 September 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - aggregated sales information of fuel wholesalers for sales of diesel and biodiesel fuel - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Energy and Public Works (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information relating to the *Liquid Fuel Supply (Ethanol and Other Biofuels Mandate) Amendment Bill 2015* (Qld): specifically, the volume of mineral diesel and biodiesel fuel (in litres) sold for the July-September and October-December 2021 quarters, and the January-March and April-June 2022 quarters, which was used in the calculation of the percentage of biodiesel sold during those quarters, as published on the relevant Queensland government website.
2. The Department located one responsive page and decided² to refuse access to it on the grounds that its disclosure would, on balance, be contrary to the public interest.
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for review of the Department's decision.
4. For the reasons explained below, I affirm the decision under review.

¹ On 25 November 2022.

² Decision dated 5 January 2023.

³ On 31 January 2023.

Background

5. Pursuant to the *Liquid Fuel Supply Act 1984* (Qld) (**LFSA**), fuel sellers (fuel retailers and fuel wholesalers) are required to sell minimum amounts of sustainable biobased fuel. The sustainable biofuels mandates, which commenced on 1 January 2017, set minimum requirements for the sale of biobased petrol and biobased diesel. The biobased diesel mandate requires 0.5% of all diesel fuel sold by fuel wholesalers to fuel retailers and bulk-end users (such as transport depot, agricultural and mining uses) to be biodiesel.⁴
6. Under the LFSA, fuel sellers are required to report on the volume of fuel sold on a quarterly or annual basis via the Queensland Fuel Sellers' Portal. This is to ensure that the mandate is being complied with, and to permit the Department to monitor compliance and to take enforcement action, if necessary. In addition, all fuel retailers and fuel wholesalers must submit an annual report. The Department publishes various statistics summarising fuel sales activity in Queensland since the commencement of the mandates. In respect of biodiesel, this is expressed by a graph and table that indicate the volume of biodiesel sold by wholesalers for each quarter as a percentage of the total volume of diesel sold.⁵ The applicant seeks access to the background information used to calculate this percentage: that is, the volume of mineral diesel, and the volume of biodiesel, in litres, sold by wholesalers during the relevant quarters.

Reviewable decision

7. The decision under review is the decision of the Department dated 5 January 2023.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and the Appendix).⁶

Information in issue

9. The information in issue comprises one page containing the requested information in table form (**Information in Issue**). The table consists of four columns, titled 'Quarter Name', 'Diesel (L)', 'B100 (L)', and 'Biodiesel %'.

Issue for determination

10. The issue for determination is whether access to the Information in Issue may be refused under the RTI Act because its disclosure would, on balance, be contrary to the public interest.

⁴ <https://www.business.qld.gov.au/industries/manufacturing-retail/retail-wholesale/selling-fuel-qld/qld-biofuels-mandates/complying> (accessed 9 August 2023).

⁵ <https://www.business.qld.gov.au/industries/manufacturing-retail/retail-wholesale/selling-fuel-qld/qld-biofuels-mandates/fuel-seller-statistics> (accessed 9 August 2023).

⁶ Including the *Human Rights Act 2019* (Qld) (**HR Act**), to the extent necessary to do so. The participants in this review are not 'individuals', and only individuals have human rights under the HR Act, section 11. However, Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. To the extent then that it is necessary to observe relevant rights under section 58(1) of the HR Act, I am satisfied that I have done so. This is because in observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decision maker will be '*respecting and acting compatibly with*' applicable human rights as stated 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].) In this regard, I note Bell J's observations at [573] of *XYZ* on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '*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*'.

Relevant law

11. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest⁷ to give access.⁸ The Act must be applied and interpreted to further this primary object,⁹ and is to be administered with a pro-disclosure bias.¹⁰
12. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,¹¹ including grounds on which access may be refused.¹² One of these grounds (which are to be interpreted narrowly)¹³ permits an agency to refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.¹⁴
13. The steps to be followed in determining whether disclosure of information would, on balance, be contrary to the public interest, are prescribed in section 49 of the RTI Act. In summary, a decision-maker must:
 - identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
14. 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 taken no irrelevant factors into account in making my decision.

Submissions of the parties

15. There were several exchanges of submissions between the parties during the course of the review. The applicant lodged a submission on 31 January 2023 in conjunction with its application for external review, and additional submissions dated 19 May 2023 and 6 July 2023. The Department lodged submissions dated 3 May 2023, 6 June 2023, and 20 July 2023.
16. The applicant relies on the following public interest factors favouring disclosure:
 - a) disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability¹⁵

⁷ '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 at 75. 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.

⁸ Section 3(1) of the RTI Act.

⁹ Section 3(2) of the RTI Act.

¹⁰ Section 44 of the RTI Act.

¹¹ Section 23(1) of the RTI Act.

¹² Section 47 of the RTI Act.

¹³ Section 47(2)(a) of the RTI Act.

¹⁴ Sections 47(3)(b) and 49 of the RTI Act.

¹⁵ Schedule 4, part 2, item 1 of the RTI Act.

- b) disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest¹⁶
 - c) disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds¹⁷
 - d) disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency¹⁸
 - e) disclosure could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;¹⁹ and
 - f) disclosure could reasonably be expected to contribute to the protection of the environment.²⁰
17. The Department relies on the following public interest nondisclosure/harm factors:
- a) disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities²¹
 - b) disclosure could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person²²
 - c) 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 disclosure could reasonably be expected to have an adverse effect on those affairs;²³ and
 - d) disclosure of the information is prohibited by an Act.²⁴
18. I have considered the application of the other factors favouring disclosure and nondisclosure listed in schedule 4 to the RTI Act, and have identified no others that I consider apply to the Information in Issue.²⁵
19. The phrase '*could reasonably be expected to*', as contained in each of the factors, 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 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.²⁶ Importantly, the expectation must arise as a result of disclosure of the specific information in issue, rather than from other circumstances.²⁷

¹⁶ Schedule 4, part 2, item 2 of the RTI Act.

¹⁷ Schedule 4, part 2, item 4 of the RTI Act.

¹⁸ Schedule 4, part 2, item 6 of the RTI Act.

¹⁹ Schedule 4, part 2, item 10 of the RTI Act.

²⁰ Schedule 4, part 2, item 13 of the RTI Act.

²¹ Schedule 4, part 3, item 2 of the RTI Act.

²² Schedule 4, part 3, item 15 of the RTI Act.

²³ Schedule 4, part 4, section 7(1)(c) of the RTI Act. The Department did not seek to argue that the requirements of either of sections 7(1)(a) or (b) were met by the Information in issue.

²⁴ Schedule 4, part 3, item 22 of the RTI Act.

²⁵ In the event that further factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the weight I have afforded to the public interest factors favouring nondisclosure of the Information in Issue.

²⁶ *Murphy and Treasury Department* (1995) 2 QAR 744 at [44], citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [160]. See also *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

²⁷ *Murphy and Treasury Department* (1995) 2 QAR 744 at [54].

Findings

Public interest factors favouring disclosure

Items c) to e) of paragraph 16

20. In terms of the public interest disclosure factors listed at items c) to e) of paragraph 16 above, I have considered the applicant's submissions in support of the application of these factors to the Information in Issue. However, I am not satisfied that the applicant has established, by reference to supporting evidence or reasoning, that real and substantial grounds for the relevant expectations exist, as opposed to an assumption, mere speculation or a remote possibility. The applicant's submissions do not explain how it contends that disclosure of the specific Information in Issue could reasonably be expected to give rise to the relevant expectation.

21. In respect of item c) (effective oversight of the expenditure of public funds), the applicant submitted as follows:²⁸

To the extent that the Government subsidises the production of biodiesel, therefore, its use in motor vehicles on Queensland's roads, it is great public interest that the availability of that fuel and its usage is known. It is taxpayer's money that is being used.

22. I acknowledge that the Queensland government subsidises the production of biodiesel. The Information in Issue comprises quarterly volumes of mineral and biodiesel sold by fuel wholesalers in Queensland to a range of end users. The applicant has not explained precisely how disclosure of this data could reasonably be expected to ensure meaningful and effective oversight of the funds expended by the Queensland government in subsidising the production of biodiesel. Nor am I able to identify how disclosure could reasonably be expected to provide any meaningful insight into the usage of biodiesel,²⁹ or how its usage is relevant to overseeing the expenditure of public funds. The applicant has not identified a sufficient link between disclosure, and the required outcome, such as to satisfy me that its submission is not merely speculative, or remote in nature. I am therefore not satisfied that this factor applies to the Information in Issue.

23. In respect of item d) (allow or assist inquiry into possible deficiencies in agency conduct or administration), the applicant submitted as follows:

Parliament has instituted the biodiesel mandate to contribute to its efforts to manage the climate change crisis. Producers of biodiesel are entitled to know how the percentages are calculated and the data upon which those calculations are made. More broadly, it is in the Queensland public's interest to know this information as the whole of the State contributes to dealing with climate change and its impacts on the environment.³⁰

...

With evidence pointing to a diminishing biofuels market, biodiesel producers also have a legitimate expectation that the (Ethanol and Other Biofuels Mandate) is being administered correctly.³¹

24. Information about how the percentages are calculated is published on the Department's website. There is no evidence before me to support the applicant's assertion that the biofuels market is diminishing. However, even if were, there is nothing before me, including in the applicant's submissions, to indicate that a reduction in the market is reasonably attributable to some deficiency in the Department's administration of the

²⁸ Letter dated 19 May 2023.

²⁹ Noting the information published by the Department, as described in paragraph 6 above.

³⁰ Letter dated 19 May 2023.

³¹ Undated letter provided under cover of the application for external review.

LFSA or the biodiesel mandate. The applicant has not identified any possible deficiency, nor has it explained how disclosure of the Information in Issue could reasonably be expected to allow or assist inquiry into any deficiency even if one were to exist. As the applicant has not established real and substantial grounds for the relevant expectation, as opposed to mere speculation or assertion, I am not satisfied that this factor applies to the Information in Issue.

25. In respect of item e) (advance the fair treatment of individuals or entities in accordance with the law), the applicant submitted as follows:³²

It is in the interests not only of our client – but also its competitors – to know this information. It will enable all of them to ensure that they each receive fair treatment at the hands of the relevant agencies and that their dealings are open and transparent and can be properly scrutinised.

Such scrutiny would be not only be possible [sic] by the Government but also the public, and the shareholders and other stakeholders in each of the producers.

[Applicant's emphasis]

26. I accept that disclosure of the Information in Issue may, to some extent, enhance the transparency of the Department for its administration of the LFSA and the biodiesel mandate, and allow scrutiny of the information supplied to the Department by fuel wholesalers and upon which published percentages are calculated. I will discuss those issues further below.³³ However, the applicant has not explained how it contends that disclosure could reasonably be expected to advance the fair treatment by the Department of any individual or entity in accordance with the administration of the LFSA or any other law. It has not detailed the particular treatment by the Department (or any other agency) under the LFSA (or any other law) that it argues could reasonably be expected to be advanced by disclosure of the Information in Issue. Again, I consider the applicant has failed to establish real and substantial grounds for the relevant expectation. I am therefore not satisfied that this factor applies to the Information in Issue.
27. For the reasons explained, I am not satisfied that disclosure of the Information in Issue will advance any of the public interest factors favouring disclosure identified at items c) to e) of paragraph 16 above. Accordingly, I find that none of those factors arise for consideration in the public interest balancing test.

Items a), b) and f) of paragraph 16

28. Turning firstly to items a) and b) of paragraph 16 – the public interest in enhancing the accountability and transparency of the Department, and in disclosing information that could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest – the applicant submitted as follows:³⁴

Releasing this information will:

- (a) promote open discussion of a matter important in Queensland's public affairs and enhance the Government's accountability – including the actions of the Minister and the Department, and*
- (b) enable residents and entities in the State of Queensland to interrogate that information and openly discuss the success or otherwise of the Government's biofuel mandate, its implementation, or both.*

³² Letter dated 19 May 2023.

³³ See paragraphs 32-33 and 39 below.

³⁴ Letter dated 19 May 2023.

The community accepts and the Government says it accepts that the climate emergency is the most important issue confronting the world and State of Queensland itself. As such, it is imperative that all Queenslanders and Queensland entities have access to information that will enable them to examine the policies and actions of the Government.

As the Government is the leader of action in Queensland for addressing and dealing with the climate change crisis, it is imperative that all steps taken to deal with the issue can be scrutinised. This will enable positive steps to be enhanced, promoted, and continued into the future; and also allow steps that are not working to be eliminated, modified, or reduced.

29. Throughout its submissions, the applicant emphasised its contention that disclosure of the Information in Issue would assist in *'tackling the climate change crisis'*, arguing that the Department is obligated to interpret and administer the LFSA in such a way as to help alleviate the crisis. It submitted that disclosure would enable the government and the industry to do this by *'understand[ing] what is happening and how to plan to improve the ongoing activities in the sector'*.³⁵
30. The applicant also made the following specific submission in support of its reliance upon item f) of paragraph 16 – the public interest in contributing to the protection of the environment:³⁶

Our client instructs us that this is the most important public interest ground that needs to be fully considered...

As the whole of the world and the whole of the state of Queensland make the significant and deliberate shift to less carbon emitting fuels and energy and adopts renewable and less emitting forms of fuel and energy, it is most important that this information be available.

One of Queensland's most important industries is tourism and every Queenslander knows that the State's most valuable asset it [sic] the Great Barrier Reef, supporting thousands of businesses and the tens of thousands of jobs. Its importance to the economy is beyond doubt. This, any actions taken to address the impacts of climate change must be open to interrogation by all citizens.

31. The applicant also submitted that disclosure of the Information in Issue would assist in carrying out the stated objectives of Part 5A of the LFSA, as set out in the Explanatory Memorandum:³⁷

- provide assurance to existing ethanol and biodiesel producers and stimulate investment in a biofuels industry in Queensland.

The fact that ethanol producers report volume by litres shows that it is not only possible, but also desirable. There is no reason for the different treatment of these fuels.

- contribute to regional growth and jobs creation.

None of the biodiesel producers can look to expand with confidence without knowing the true state of affairs which would be revealed if the information requested was released.

³⁵ Letter dated 19 May 2023.

³⁶ Letter dated 19 May 2023.

³⁷ Letter dated 19 May 2023.

- reduce greenhouse gas emissions from motor vehicles.

The benefits that would flow from disclosure under this objective are self-evident.

- take advantage of the emerging second-generation technologies for biofuels from a range of feedstock.

Releasing the information requested would enable this to occur.

32. I am satisfied that there is a public interest in the accountability and transparency of the Department for the discharge of its regulatory obligations under the LFSA that would be enhanced by disclosure of the Information in Issue. This includes the ability to scrutinise the Department's administration of the biodiesel mandate and the information collected pursuant to that mandate which, it is reasonable to assume, may inform decisions and policies relating to the biofuels industry.
33. I also accept that disclosure of the Information in Issue may allow a more informed discussion and debate about certain aspects of the government's biodiesel mandate and the productivity of the biodiesel industry more generally. By giving industry participants access to the total volumes of diesel and biodiesel sold by wholesalers in Queensland across the relevant periods, this may, in turn, assist participants or potential participants in the industry to better assess the viability of the biodiesel market and make more informed business decisions about production levels and their level of participation in the industry.
34. However, the applicant's submissions have not satisfied me that disclosure of the Information in Issue would serve to further other stated objectives of the LFSA, as set out at paragraph 31 above. The submissions are general in nature, rather than focussing on the Information in Issue and explaining how its disclosure could reasonably be expected to have the effects argued for. As such, despite the applicant's submissions, I am unable to identify how disclosure would, of itself, reduce greenhouse emissions, allow industry participants to take advantage of emerging biofuel technologies, or contribute to regional growth and jobs creation. Whether disclosure of the Information in Issue would ultimately have any of these effects is uncertain – it is a mere possibility, rather than an expectation for which real and substantial grounds exist. As to the fact that ethanol producers report sales volumes by litres, the Department explained in its submissions the reasons for this, and for the different treatment of biodiesel. I will discuss this issue further below in the context of public interest factors favouring nondisclosure.
35. This leads to a discussion about the applicant's contention that disclosure of the Information in Issue could reasonably be expected to contribute to the protection of the environment.
36. I acknowledge that one of the stated objectives of Part 5A of the LFSA is the reduction of greenhouse emissions caused by fossil fuels, and that the purpose of the mandates is to move Queensland towards a 'clean energy economy' through advancing the uptake of biofuels, and strengthening the biofuels and biomanufacturing industry in Queensland.³⁸ I accept that these objectives, ultimately, have the protection of the environment at their core. However, I am not persuaded that there are reasonable grounds for expecting that disclosure of the Information in Issue, of itself, could reasonably be expected to contribute to the protection of the environment. Again, it is merely possible that disclosure may ultimately have this effect, rather than it being an expectation for which real and substantial grounds exist, supported by evidence and

³⁸ <https://www.epw.qld.gov.au/about/initiatives/biofuel-mandates> (accessed 9 August 2023).

cogent reasoning. I have noted above at paragraph 33 that I am satisfied that disclosure may allow participants in the biofuels industry to make better informed decisions about their business. However, what those decisions might be, and whether they would ultimately contribute to the protection of the environment, is uncertain.

37. The applicant refers in its submissions to the dangers of climate change and of the importance of protecting the Great Barrier Reef. I would not seek to challenge the veracity of those general assertions. However, general assertions such as these are not sufficient to discharge the onus on the applicant to demonstrate that real and substantial grounds exist for expecting that disclosure of the specific Information in Issue will contribute to the protection of the environment. I am not satisfied that the applicant has discharged this onus so as to persuade me that this public interest factor arises for consideration. However, if I am wrong in that regard, and it is to be accepted that disclosure will, at the very least, facilitate industry debate around the pros and cons of the mandate and that such debate must, inevitably, contribute to the protection of the environment (in terms of facilitating changes or improvements to the scheme), I would afford this public interest factor only low weight in the public interest balancing test, taking account of the uncertainty and remoteness of the argument.
38. It must also be remembered that the primary purpose of requiring fuel wholesalers to submit their sales figures to the Department is to ensure that the mandate is being complied with, and the targets achieved. To what extent disclosure of this information could usefully facilitate meaningful debate around the success or otherwise of the mandate is unclear from the applicant's submissions, particularly given the information already published by the Department demonstrating the level of compliance with the mandate in percentage terms.
39. Returning to the weight to be afforded to the public interest in enhancing the accountability of the Department, and in disclosing information that could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest, I decide to afford only moderate weight to each of these factors when balancing the public interest. I am not satisfied that disclosure of the Information in Issue could reasonably be expected to significantly enhance the accountability of the Department for its role in regulating compliance with the LFSA, or the mandate, beyond the information already published, nor that disclosure could reasonably be expected to significantly contribute to open debate and discussion about the success of the mandate or the biofuels industry in Queensland more generally. As discussed at paragraph 38 above, I have taken account of the purpose for which the Information in Issue is supplied to the Department by fuel wholesalers, as well as the information already published by the Department concerning compliance with the biodiesel mandate. The Department's position is that it meets its reporting obligations to the extent that is possible under the LFSA (taking account of legislative requirements around confidentiality, which I will discuss further below), by publishing the information referred to at paragraph 6 above, namely, the volume of biodiesel sold by wholesalers for each quarter as a percentage of the total volume of diesel sold.

Public interest factors favouring nondisclosure

40. As set out at paragraph 17 above, the Department relies upon four public interest nondisclosure/harm factors. The factor upon which both parties focused the bulk of their attention is the Department's contention that disclosure of the Information in Issue is contrary to the public interest because its disclosure is prohibited by an Act.

Item d) of paragraph 17: disclosure is prohibited by an Act

41. In its submission dated 3 May 2023, the Department stated as follows:

- Biodiesel and mineral diesel volumes are reported by individual wholesalers in accordance with sections 35E or 35P of the LFSA.
- Sections 35E and 35P require fuel sellers to report on the volume of fuel sold on a quarterly or annual basis.
- Section 35E provides:

35E Quarterly returns

(1) *A fuel seller must give a return, in the approved form, to the chief executive within 1 month after the end of each calendar quarter, unless the fuel seller has a reasonable excuse.*

Maximum penalty—100 penalty units

(2) *The return must state the volume of the following that the fuel seller sold in the calendar quarter at each of the fuel seller's fuel facilities—*

(a) ...

(h) *for a fuel wholesaler—*

(i) *diesel and diesel-biobased diesel blend; and*

(ii) *diesel-biobased diesel blend; and*

(iii) *sustainable biobased diesel sold in diesel-biobased diesel blend.*

- There is also a requirement under section 35P for fuel sellers to provide an annual report:

35P Reporting fuel sold

(1) *A fuel seller must give a report, in the approved form, to the chief executive before 31 July each year, unless the fuel seller has a reasonable excuse.*

Maximum penalty—100 penalty units.

(2) *The report must state the volume of petrol, petrol-biobased petrol blend, diesel, and diesel-biobased diesel blend, that the fuel seller supplied from each of the fuel seller's fuel facilities—*

(a) *in the last financial year; and*

(b) *in each calendar quarter of the last financial year.*

(3) *This section does not apply to a fuel seller if the fuel seller gives the information mentioned in subsection (2) to the chief executive in or with returns given under section 35E.*

- Reporting of biodiesel sales volumes is made via an online portal (Queensland Fuel Sellers' Portal).
- The Department's Fuel Seller Register privacy statement (which appears in the Portal User Guide) relevantly states that information provided '*will be shared with the Department of Energy and Public Works, the Department of Environment and Science and the Department of Transport and Main Roads for the purpose of managing the Portal, monitoring compliance with and taking action to enforce, the [LFSA] and the Biofuels Mandate. The State will not use or disclose the information*

for any other purpose unless authorised or required by law or without your prior consent...’.

- The information provided by fuel sellers via the portal and pursuant to section 35E is clearly received by the State for the purpose of administering LFSA. Fuel sellers who are mandated to report their information in accordance with the LFSA do so on the basis of certain confidentiality obligations that are specified in section 9 of the LFSA and in the privacy statement on the portal.
- Section 9 of the LFSA prohibits the disclosure of information obtained in connection with the administration of the LFSA:

9 Confidentiality

A person shall not disclose information obtained in connection with the administration or execution of this Act unless the disclosure is made—

- (a) with the consent of the person from whom the information was obtained; or*
- (b) in connection with the administration or execution of this Act; or*
- (c) for the purpose of any legal proceeding arising out of this Act or for the purposes of any report of any such proceeding; or*
- (d) under the compulsion of an order made by a court of competent jurisdiction in any proceedings to which the information is material.*

Maximum penalty—\$1000.

- Section 9 prohibits disclosure of the Information in Issue under the LFSA and none of the exceptions apply.

42. In response, the applicant argued as follows:³⁹

- It was not requesting access to confidential information about any individual or entity, and that because it would not be possible to identify any confidential information of any particular fuel wholesaler through disclosure of the Information in Issue, no offence under section 9 of the LFSA would be committed.
- In respect of section 9 of the LFSA, while the applicant accepted that the exceptions in subsections (c) and (d) did not apply, it argued that no consent was required under subsection (a) because it was impossible to identify any confidential information of any individual wholesaler. However, if it was wrong in that regard, the applicant supplied OIC with letters that it has obtained from two other biodiesel producers/wholesalers, consenting to disclosure to the applicant of information that they had supplied to the Department in accordance with the LFSA’s reporting requirements.
- The applicant also argued that the exception in subsection (b) of section 9 was enlivened because disclosure of the Information in Issue was in connection with the administration of the LFSA, taking account of the fact that one of the ‘*other purposes*’ for which it is reasonable to find the LFSA was enacted included ‘*issues of sustainability and emissions reduction*’.⁴⁰

43. Despite the applicant’s submission, I am satisfied that the Information in Issue comprises information obtained by the Department in connection with the administration or execution of the LFSA. It is therefore confidential information under section 9 of the LFSA and its disclosure is *prima facie* prohibited.

³⁹ Letter dated 6 July 2023.

⁴⁰ The applicant noted that the long title of the LFSA is ‘*An Act to provide for the production, supply, distribution, sale, use and conservation of liquid fuel in the event of a shortage of liquid fuel occurring in the State and for other purposes*’. (Applicant’s emphasis).

44. As noted, the applicant has made submissions in support of the application of the exceptions to the prohibition on disclosure contained in sections 9(a) and 9(b) of the LFSA. However, those exceptions apply to disclosure of information under the LFSA, and not the RTI Act. Whether or not the chief executive accepts in relevant circumstances that either of those exceptions is made out in terms of the LFSA, and thus permits disclosure of relevant information under the LFSA, is a matter relevant to the administration of the LFSA. However, it is not relevant to the issue of disclosure of the Information in Issue under the RTI Act. The purpose of the prohibition on disclosure in the LFSA, and any exceptions to that prohibition, are to be determined from the LFSA, and not from the RTI Act. The authority to disclose information that the operation of the exceptions to the prohibition confer is not open to be exercised by a decision-maker under the RTI Act, who is charged only with assessing whether disclosure of the Information in Issue is prohibited by an Act, such as to enliven the application of the nondisclosure factor contained in schedule 4, part 3, item 22 of the RTI Act. For the reasons explained above, I am satisfied that it is.
45. In terms of the weight to be afforded to this public interest factor, the mere fact that Parliament decided that there should be a prohibition on disclosure of information obtained in connection with the administration or execution of the LFSA is ordinarily deserving of significant weight. I acknowledge that section 35R of the LFSA provides for a publication/reporting regime, whereupon the chief executive can exercise their discretion to publish certain information on the Department's website. However, in terms of the information that the applicant seeks to access, the chief executive has chosen not to publish it. Section 35R(c) provides for the publication of biodiesel sales as a percentage of the combined volume of diesel and biodiesel sold in the relevant quarter (for all fuel sellers or stated fuel sellers).
46. In these circumstances, I am satisfied that disclosure of the Information in Issue is prohibited by an Act, and the chief executive has not exercised their discretion to publish the information. I afford significant weight to this public interest factor favouring nondisclosure.

Items a), b) and c) of paragraph 17: prejudice/harm to business/commercial affairs etc

47. The applicant argued in its submissions that, because of their similarity, these factors should not be considered separately nor given individual weighting when balancing the public interest, but instead should be considered collectively.⁴¹ I accept that this is correct in respect of items a) and b), which are both Part 3 nondisclosure factors that provide for the same effect in the context of the Information in Issue, namely, whether disclosure could reasonably be expected to prejudice the business (or business/commercial/financial) affairs of the reporting entities. If a Part 3 factor applies, it is up to the decision-maker to decide if a prejudice will result from disclosing the information in question. However, item c) is a Part 4 harm factor. For these factors, Parliament has decided that if they apply, they will cause a harm, and the decision-maker must decide how much weight should be given to the factor.
48. In its decision, the Department decided that disclosure of the Information in Issue could indirectly disclose a wholesaler's individual volumes of sold biodiesel as obtained under section 35E of the LFSA:

... I am of the view that [disclosure] could reasonably be expected to prejudice the commercial, business and/or financial affairs of various entities involved in the biodiesel

⁴¹ Letter dated 19 May 2023.

industry. This is because there is a limited cohort of biodiesel producers and fuel wholesalers operating in Queensland at this time. The small cohorts in each stage of supply chain increase the potential for identifiability, and by extension indirect disclosure of commercially sensitive information - namely contractual arrangements between biodiesel producers and fuel wholesalers, and fuel wholesalers and biodiesel customers.
...

The risk associated with disclosure of specific volumes was identified at the inception of the legislation. As stated in the *Liquid Fuel Supply (Ethanol and Other Biofuels Mandate) Amendment Bill 2015 Explanatory Note*, to protect commercial-in-confidence information, only percentages of sustainable biofuel in the fuel sold by fuel sellers are published. Since the mandate commenced, the number of biodiesel producers in Australia has reduced, elevating this risk.

The biodiesel producers and fuel wholesalers are entitled to a legitimate expectation that information about their business, the disclosure of which could result in harm to their business, would be afforded protection from unreasonable disclosures outside of the Department that the law affords.

49. In its letter dated 3 May 2023, the Department submitted as follows in respect of the publication regime contained in section 35R of the LFSA:

- If the Information in Issue were to be published, there is a genuine concern for the capacity of a third party to reverse engineer the aggregated data so as to identify and attribute commercially sensitive information to the reporting entities. This is particularly so given the very small cohort of biodiesel wholesalers in Queensland.
- The chief executive has exercised the discretion under section 35R to publish the relevant 'Quarter' column and the 'Biodiesel Percent' column on the Business Queensland webpage. The data is derived and aggregated from the information that must be reported to the Department by fuel wholesalers every quarter under section 35E(h) of the LFSA.
- The Explanatory Notes for the *Liquid Fuel Supply (Ethanol and Other Biofuels Mandate) Amendment Bill 2015* are referred to in the '*Biofuels Mandate Compliance and Enforcement Strategy*' and provide insight into the intention of Parliament and the Department in terms of their management of commercially sensitive information. Page 6 of the Explanatory Notes provides:

Clause 6 inserts section 35R (Publishing information) and 35S (Compensation). Section 35R allows the chief executive to publish information derived from fuel sellers' quarterly returns on the department's website. This may be considered an invasion of privacy. Publication of the performance of fuel sellers' compliance with the biofuels mandates is a key element of the scheme in Queensland as it is in NSW and is considered to be justified. To protect commercial-in-confidence information, only percentages of sustainable biofuel in the fuel sold by fuel sellers will be published. The NSW scheme has an equivalent provision on which this section in the Bill has been drafted.

[Department's emphasis]

- The Explanatory Notes also provide:

As the department does not hold or have access to existing reliable data on the fuel industry in Queensland, it is necessary to oblige all fuel sellers to be registered and to keep the register up to date as well as to provide the initial report on fuel sales to provide a reliable base line of data. The intention is to commence the registration and initial reporting obligations at least three to six months before a biofuels mandate under sections 35B or 35C commence to apply. Unlike the quarterly returns, information contained in the initial report on fuel sales and registration information will be treated in strict confidence and no confidential information will be published.

- It is evident that Parliament turned its mind, when enacting the legislation, to what reported information, if any, it considered would be appropriate for publication.
 - Commercial sensitivity was a key consideration influencing Parliament's decision to enact the legislation in its current form, including the overarching protection afforded by section 9 and the authorisation of section 35R to limited publication where commercial confidentiality could first be considered.
50. The Department also submitted that the Fuel Seller Register privacy statement (see paragraph 41 above) recognised the commercial sensitivity of the information collected by the Department, and emphasised that the information was collected only for the purpose of monitoring compliance with the biofuel mandates.⁴²
51. In response to the Department's submissions, the applicant argued that the Department published sales volumes by litres in relation to ethanol, and that there was no reason to treat biodiesel any differently. It also argued that in every other jurisdiction where there is a mandate, the sales volume by litres is published.⁴³
52. However, the Department clarified that the mandate in Queensland does not require producers of biofuels (ethanol or biodiesel) to supply the Department with commercially sensitive fuel volumes – it requires fuel wholesalers of diesel/biodiesel blends (and fuel retailers for petrol/E10) to supply their commercially sensitive fuel volumes (both mineral fuels and biofuels volumes). The Department submitted that, for this reason, the ethanol mandate is treated differently to the biodiesel mandate as the number of fuel retailers selling an ethanol blended fuel is very large, while the number of fuel wholesalers selling biodiesel is small, particularly in the early stages of the mandate.⁴⁴
53. The applicant rejected these submissions in its letter dated 6 July 2023, arguing that:
- the number of fuel wholesalers in question '*number 7 or 8 at least*'
 - the release of the Information in Issue would not allow any individual wholesaler or their sales information to be identified and the Department's concern is '*grossly implausible and wholly illusory*'; and
 - the mandate is not in its early stages but is in fact halfway through its statutory timeframe.
54. Firstly, I accept that the Information in Issue is properly to be characterised as concerning the business, commercial or financial affairs of the reporting entities. It comprises fuel sales data required to be submitted by the reporting entities to the Department through the online reporting portal.
55. Secondly, I accept that, if the sales data for individual wholesalers were able to be ascertained from disclosure of the Information in Issue, it is reasonable to expect that such disclosure would have a prejudicial or adverse effect on the business, commercial or financial affairs of the relevant entities. I accept that fuel wholesalers operate in a commercially competitive environment. I also acknowledge that Parliament recognised, at the time of enacting the legislation, the commercial nature of the sales information that reporting entities were obligated to provide to the Department, and the need to protect that information.

⁴² Letter dated 3 May 2023.

⁴³ Letter dated 19 May 2023.

⁴⁴ Letter dated 6 June 2023.

56. Given that the Department's submission is premised on the argument that disclosure of the Information in Issue could reasonably be expected to⁴⁵ enable a person to 'reverse engineer' the aggregated data and ascertain sales information for individual wholesalers, OIC asked the Department to advise of the specific number of reporting entities whose sales information comprised the Information in Issue, so as to assess the reasonableness of the Department's contention.⁴⁶ However, the Department declined to provide this information, stating that it considered that such information was confidential under section 9 of the LFSA; that it was not in the public domain; and that it was only available to the Department for the purpose for which it was collected under the LFSA: '*We respectfully request that OIC reconsider our earlier submissions advising that the number of biodiesel wholesalers is very low*'.⁴⁷
57. The applicant contends that there are '*7 or 8 wholesalers*' involved in the Information in Issue and that the potential to identify the fuel sales data for any individual wholesaler is '*implausible*'. Given that the Department is aware of the exact number of reporting entities in question, I consider I am obliged to accept the Department's assertion that the relevant number is '*very low*' and that this, in turn, increases the potential for reverse engineering of the data. Also of relevance in considering the potential for reverse engineering and thereby attributing fuel sales information to individual wholesalers is the fact that the applicant has shown during the course of the review that at least two other fuel wholesalers are willing to provide the applicant with details of their sales information (see paragraph 42 above), thus presumably increasing the likelihood of being able to attribute at least a reasonable estimate of sale volumes to the remaining wholesalers.
58. However, while I accept that the lower the number of fuel wholesalers involved in the Information in Issue, the greater the potential for reverse engineering the aggregated data, I am not satisfied, on the basis of the Department's submissions, that there are reasonable grounds for expecting that disclosure of the Information in Issue would allow reverse engineering with a sufficient degree of accuracy such as to cause a significant prejudicial or adverse effect on the business, commercial or financial affairs of the reporting entities. To the extent that reverse engineering may permit a reasonable estimate of the sales information of any one fuel wholesaler to be made, I afford moderate weight to the relevant nondisclosure/harm factors.
59. In its decision, the Department also argued that the small cohorts in each stage of the supply chain increased not only the potential for identifiability but also, by extension, indirect disclosure of commercially sensitive information - namely contractual arrangements between biodiesel producers and fuel wholesalers, and between fuel wholesalers and biodiesel customers. However, I am not satisfied that the Department has established a reasonable basis for this expectation. The Department has not explained how commercially sensitive information about contractual arrangements between participants in the biodiesel industry could reasonably be expected to be ascertained from disclosure of the Information in Issue.
60. In summary, having considered the submissions of both parties, and for the reasons discussed above, I decide to afford moderate weight to the nondisclosure and harm factors concerned with protecting the business, commercial and financial affairs of the reporting entities on the grounds that disclosure of the Information in Issue could reasonably be expected to permit an estimate of the sales information of individual biodiesel wholesalers to be obtained, thereby having the requisite prejudicial/adverse effect.

⁴⁵ See paragraph 19 regarding the interpretation to be given to the phrase '*could reasonably be expected to*'.

⁴⁶ Email of 15 August 2023.

⁴⁷ Email of 28 August 2023.

Balancing the public interest

61. For the reasons given, I afford moderate weight to the public interest factors favouring disclosure listed at items a) and b) of paragraph 16. I am not satisfied that the factors listed at items c) to f) of paragraph 16 apply to the Information in Issue. If I am wrong about item f), I would afford it low weight in the public interest balancing test.
62. I afford moderate weight to the public interest factors favouring nondisclosure listed at items a) and b) (combined) and item c) of paragraph 17. I afford significant weight to the factor listed at item d) of paragraph 17.
63. I acknowledge that the competing public interest factors are finely balanced. However, after evaluating and balancing the weight I have attributed to each, I am satisfied that the factors favouring nondisclosure outweigh those favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access under the RTI Act may be refused on that basis.

DECISION

64. I affirm the decision under review by finding that access to the Information in Issue may be refused under the RTI Act because its disclosure would, on balance, be contrary to the public interest.
65. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Rachel Moss
Principal Review Officer

Date: 14 September 2023

APPENDIX

Significant procedural steps

Date	Event
31 January 2023	OIC received the application for external review OIC requested and received the preliminary documents from the Department
27 February 2023	OIC advised the parties that the application for external review had been accepted
9 March 2023	OIC requested the Department's response to the applicant's submissions made in its external review application
3 May 2023	OIC received submissions from the Department
4 May 2023	OIC expressed a preliminary view to the applicant
19 May 2023	OIC received submissions from the applicant
23 May 2023	OIC invited the Department to respond to the applicant's submissions
6 June 2023	OIC received submissions from the Department
7 June 2023	OIC provided the Department's submissions to the applicant
6 July 2023	OIC received further submissions from the applicant OIC provided the applicant's submissions to the Department
20 July 2023	OIC received submissions from the Department
25 July 2023	OIC provided the Department's submissions to the applicant
15 August 2023	OIC requested information from the Department
28 August 2023	OIC received the Department's response