



Decision and Reasons for Decision

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| Citation: | <i>Mt Coot-tha Local Residents and Brisbane City Council [2021] QICmr 49 (27 September 2021)</i> |
| Application Number: | 314791 |
| Applicant: | Mt Coot-tha Local Residents |
| Respondent: | Brisbane City Council |
| Decision Date: | 27 September 2021 |
| Catchwords: | ADMINISTRATIVE LAW - RIGHT TO INFORMATION - FORMS OF ACCESS - COPYRIGHT - monitoring reports - whether giving access to a copy of the document would involve an infringement of the copyright of a person other than the State - access granted by way of inspection only - section 68(4)(c) of the <i>Right to Information Act 2009</i> (Qld) ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - access refused to information about reserves at quarry - business, commercial, financial affairs - whether disclosure would, on balance, be contrary to public interest - whether access may be refused under sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld) |

REASONS FOR DECISION

Summary

1. The applicant applied to Brisbane City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a range of documents¹ relating to the operation of the Mount Coot-tha Quarry (**MCQ**) in Brisbane.
2. The scope of the access application was subsequently expanded by agreement with Council² during the processing of the access application, to include the graphical blast vibration reports for two monitoring locations, in relation to blasts that occurred on nine different dates (**Expanded Scope**).³
3. In its decision dated 16 August 2019, Council gave an explanation to the applicant about the monitoring points in response to Item 1 of the applicant's access application and otherwise decided to:

¹ See paragraph 13 for full terms of the original application.

² On 28 June 2019 the applicant contacted Council to request that the scope of the application be expanded. By email dated 1 July 2019 Council agreed to include the Expanded Scope.

³ Being 7 December 2017, 9 February 2018, 2 March 2018, 23 March 2018, 19 April 2018, 3 May 2018, 31 May 2018, 14 June 2018 and 21 June 2018.

- refuse to deal with Item 2 of the application;⁴ and
 - grant access to 11 pages in full and refuse access to one part page⁵ in response to Item 3 of the application.⁶
4. Council's decision did not address the Expanded Scope.
 5. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision.⁷
 6. For the reasons set out below, the decision under review is varied and access to:
 - the Monitoring Reports (see paragraph 155) can be granted by way of inspection only, under section 68(4)(c) of the RTI Act, as providing the applicant with a copy of these documents would involve an infringement of the copyright of a person other than the State; and
 - the Information in Issue (see paragraph 24) is refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest.

Background

7. The applicant is an organisation that comprises residents of homes within the vicinity of the MCQ.

Reviewable decision

8. The decision under review is Council's decision dated 16 August 2019.

Evidence considered

9. The applicant made numerous submissions to OIC during the external review and I have carefully considered this material. A number of the applicant's submissions do not engage with the issues for determination in this review or make requests that are outside the jurisdiction of OIC. On several occasions during the review, OIC explained the limits of the Information Commissioner's jurisdiction to the applicant. Despite these communications, the applicant continued to provide OIC with submissions raising matters that were either irrelevant to the issues for determination, or beyond OIC's jurisdiction. To the extent the applicant's submissions relate to issues beyond the scope of this review, they are not referred to in these reasons for decision.
10. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), which provides that it is unlawful for a public entity to make a decision in a way that is not compatible with human rights, or to fail to give proper consideration to a human right relevant to the decision.⁸ Here, the right to seek and receive information⁹ is particularly apposite. I note the observations made by Bell J on the interaction between equivalent pieces of Victorian

⁴ On the ground that the applicant had made a previous application for the same documents under section 43 of the RTI Act. Under Council reference number 2016/17-278 (**2017 application**).

⁵ On the ground that, on balance, disclosure would be contrary to the public interest under section 47(3)(b) of the RTI Act.

⁶ Council's decision dated 16 August 2019 erroneously referred to 10 pages being released in full. 11 pages were actually released in full.

⁷ Received by OIC on 26 August 2019.

⁸ Section 58(1) of the HR Act.

⁹ Section 21(2) of the HR Act.

legislation¹⁰: '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.'¹¹ I consider a decision-maker will be 'respecting and acting compatibly with' the right to seek and receive information and other rights prescribed in the HR Act, when applying the law prescribed in the *Information Privacy Act 2009 (Qld) (IP Act)* and the RTI Act.¹² I have, in accordance with section 58(1) of the HR Act, acted in this way in making this decision.

12. Significant procedural steps in this review are set out in the Appendix to this decision.

Issues for Determination

13. The applicant initially applied for access to:

Item 1: MCQ blast vibration transducer coupling/mounting method used (what and when): including concrete block, soil spike, epoxy etc

(a) All monitoring locations including the quarry office.

(b) If this was varied, when, what was the change and on what dates.

Item 2: MCQ development documents and plans: operation, blasting, blast creation, blast monitoring, extraction, shutdown, downsize, closure, closure dates, decommissioning, crusher, screener.

This would include [Company Name], [Company Name], DES and BCC documents.

Item 3: All documents relating to the 28 February 2019 blast, including; the large dust cloud, dust monitoring reports, pollution reports, actions, complaint, remediation, fine, [Company Name], [Company Name], DES etc.

Any plans for an additional dust monitoring location on Scenic Drive.

14. As noted at paragraph 2, the scope of the application was expanded by agreement between the applicant and Council, during the processing period, to include an Expanded Scope. However, Council did not address the Expanded Scope in its decision.
15. On external review OIC required Council to undertake searches for any documents responsive to the Expanded Scope.¹³ Council located eighteen pages of documents titled 'Brisbane City Works – [MCQ] Monitoring Results' (**Monitoring Reports**).
16. The Monitoring Reports are prepared by an independent third-party company (**Company A**) and comprise data collated from measurement devices located in two locations on the MCQ Site. The measurement devices record the seismic data created as a result of blasting conducted at MCQ. The data recorded is presented in the Monitoring Reports using words, figures, and a chart.
17. Council submitted that the Monitoring Reports contain the 'intellectual property' of Company A and are 'copyright protected' to Company A¹⁴ and therefore access to the Monitoring Reports should only be granted by way of inspection.¹⁵
18. OIC subsequently consulted with Company A in relation to the disclosure of some of the information comprised within the Monitoring Reports.¹⁶ While Company A was agreeable

¹⁰ *Freedom of Information Act 1982 (Vic)* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

¹¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 (**XYZ**) at [573].

¹² *XYZ* at [573]; see also *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

¹³ OIC's letter to Council dated 8 November 2019.

¹⁴ Council's letter to OIC dated 2 June 2020.

¹⁵ Except for certain information (the blast design details and explosive loading details) appearing in the Monitoring Reports, which Council maintained should not be disclosed – Council's letter to OIC dated 31 July 2020.

¹⁶ In a letter dated 11 February 2021, pursuant to sections 37 and 89 of the RTI Act.

to the disclosure of the information within the Monitoring Reports, it argued that the Monitoring Reports were subject to copyright and therefore access should be by way of inspection only.¹⁷

19. OIC formed the view, on a preliminary basis, that the Monitoring Reports were subject to copyright, but access to them could be given by way of inspection,¹⁸ subject to the redaction of the personal information of the author of the reports and information comprising the blast design details and explosive loading details, on the ground that disclosure would, on balance, be contrary to the public interest.¹⁹ This view was conveyed to the applicant.²⁰
20. The applicant did not object to OIC's view in relation to the redaction of information, however the applicant did not agree that providing access to a copy of the Monitoring Reports would involve an infringement of the copyright of Company A. Consequently, the question of whether the provision of a copy of the Monitoring Reports²¹ to the applicant would involve an infringement of copyright is an issue for determination in this decision (**Form of Access Issue**).²²
21. As noted at paragraph 3, Council refused access to all of the documents it located in response to Item 2 of the applicant's access application on the ground that the applicant had made a previous application for the same documents.²³ In its decision, Council referred to a previous access application made by the applicant in 2017 and stated that the document responsive to the 2017 application was a document titled the *Draft Mt Coot-tha Quarry Revised Extraction Plan, August 2015 (Extraction Plan)*. In response to the applicant's 2017 application, Council refused access to the Extraction Plan. Council stated that the document responsive to Item 2 of the applicant's access application was the Extraction Plan.
22. During the review, OIC requested further information from Council to ascertain whether there had been any changes or updates to the Extraction Plan since the applicant's 2017 application. In response, Council located 17 pages of documents that had been created since the 2017 application (**Extraction Plan Updates**).²⁴ Council submitted that access to all 17 pages of the Extraction Plan Updates should be refused on the ground that disclosure would, on balance, be contrary to the public interest.²⁵
23. The Extraction Plan Updates comprise two letters and additional information provided to Council by an independent company that handles the quarry planning and development for MCQ (**Company B**). The Extraction Plan Updates contain:
 - information in relation to the reserves of quarry material at MCQ, including the material volumes, the corresponding values and the locations of the reserves; and
 - third party personal information, namely, the signature and contact details of the author of the Company B material and the names, job titles and contact details of other Company B employees.

¹⁷ Company A's letter to OIC dated 17 March 2021.

¹⁸ Section 68(1)(a) of the RTI Act.

¹⁹ Section 47(3)(b) of the RTI Act.

²⁰ Section 90(1) of the RTI Act.

²¹ Subject to the redaction of the report author's personal information and blast details as noted at paragraph 19.

²² Section 68(4)(c) of the RTI Act. Consideration of the Form of Access Issue begins at paragraph 26 below.

²³ Section 43 of the RTI Act.

²⁴ Council's letter to OIC dated 10 February 2020.

²⁵ Section 47(3)(b) and schedule 4, part 3, items 2, 17 and 20 and part 4, section 4(1) of the RTI Act.

24. During the review, preliminary views about access to the Extraction Plan Updates were conveyed to Council²⁶ and the applicant.²⁷ As a result, the applicant elected not to pursue access to the third party personal information and Council agreed that access should be granted to three part-pages of information from the two letters.²⁸ The rest of the information contained within the two letters and additional information provided by Company B to Council remains in issue (**Information in Issue**).²⁹
25. Consequently, the second issue to be determined in this decision is whether access to the Information in Issue in the Extraction Plan Updates may be refused. Given the nature of the information, on the ground that disclosure would, on balance, be contrary to the public interest requires consideration (**Disclosure Issue**).³⁰

Form of Access Issue

26. In relation to the Form of Access Issue (noted at paragraphs 15 - 20 above), the question to be determined is whether the provision of a copy of the Monitoring Reports to the applicant would involve an infringement of the copyright of Company A.

Relevant law

27. Generally, OIC is not involved in reviewing 'form of access' decisions involving copyright, as the RTI Act specifically excludes these matters from OIC's jurisdiction.³¹ However, as set out above, Council did not address the applicant's request for access to the Monitoring Reports in its decision. In this particular circumstance, where Council has not addressed the applicant's request and OIC determines that access may be given to the Monitoring Reports,³² it falls to OIC to consider the issue of the form of access insofar as it relates to copyright in the conduct of the external review.
28. The RTI Act provides that if giving access in the form requested by the applicant would involve an infringement of the copyright of a person other than the State, access in that form may be refused and given in another form.³³
29. The *Copyright Act 1968* (Cth) (**Copyright Act**) deals with copyright in works in Australia. Copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author was a qualified person at the time when the work was made.³⁴

²⁶ Letter to Council dated 7 September 2020.

²⁷ Letter to the applicant dated 8 April 2021. In an email to the applicant dated 31 May 2021, OIC advised the applicant that it would proceed to a formal decision on the basis that the applicant objected to OIC's preliminary view in relation to the Information in Issue and the Disclosure Issue.

²⁸ OIC's letters dated 8 April 2021 and 19 May 2021, submissions from the applicant dated 8 April 2021, 9 April 2021, 12 April 2021, 14 April 2021, 16 April 2021, 28 April 2021, 3 May 2021, 4 May 2021, 11 May 2021, 12 May 2021 and 17 May 2021 and the applicant's emails to Council dated 12 April 2021, 13 April 2021, 21 April 2021, 23 April 2021 and 7 May 2021.

²⁹ 7 pages of PDF 1, 5 pages of PDF 2, 2 part-pages of PDF 3 and 1 page and 2 part-pages of PDF 4.

³⁰ Section 47(3)(b) of the RTI Act. Consideration of the Disclosure Issue begins at paragraph 77 below.

³¹ Section 85 of the RTI Act provides that 'a person affected by a reviewable decision may apply to have the decision reviewed by the information commissioner'. 'Reviewable decision' in Schedule 5 of the RTI Act means to include '(i) a decision giving access to a document in a form different to the form applied for by the applicant, **unless access in the form applied for would involve an infringement of the copyright of a person other than the State**' [emphasis added].

³² Subject to the redaction of the report author's personal information and blast details as noted at paragraph 19.

³³ Section 68(4)(c) of the RTI Act.

³⁴ Section 32(1) of the *Copyright Act*.

30. The word 'original' is not defined in the *Copyright Act*, but has been taken to mean that the work originates from the author, i.e., it was not copied,³⁵ and will result where the author has applied his/her knowledge, judgement, skill or labour.³⁶
31. Relevantly, the *Copyright Act* defines 'artistic work' to include a drawing, whether the work is of artistic quality or not.³⁷ 'Drawing' includes 'a diagram, map, chart or plan'.³⁸
32. The *Copyright Act* defines 'literary work' to include a table, or compilation, expressed in words, figures or symbols.³⁹
33. Copyright in relation to an artistic or literary work is an exclusive right to do various acts, including reproducing the work in a material form.⁴⁰ Infringement of copyright occurs when a person who is not the owner of the copyright, and does not have the licence of the owner, does or authorises the doing of any act comprised in the copyright.⁴¹
34. However, the *Copyright Act* does provide that some acts do not infringe copyright – for example, fair dealings for the purpose of criticism or review, research or study, parody or satire, reporting news, judicial proceedings or giving professional advice,⁴² and acts done for the services of the Crown.⁴³

Findings

35. As previously noted, Council argued that the Monitoring Reports are subject to copyright and therefore access should be by way of inspection only. Company A, the purported owner of the copyright, stated that while it was agreeable to the applicant inspecting the Monitoring Reports, the Monitoring Reports were subject to copyright and it did not agree to copies being provided to the applicant.⁴⁴
36. Council also submitted:⁴⁵

Some of the information contained in these reports is not required for Council's licence conditions, but is prepared in order to collect vital technical information which may be used for future predictions and analysis of blasting results.
37. The applicant argued that access should be given to a copy of the Monitoring Reports. The applicant sought access to a copy of the Monitoring Reports, as it considered that MCQ was not complying with Schedule F of Council's development permit, which refers to the testing of noise level in noise sensitive places.⁴⁶ Further the applicant submitted that only inspecting, rather than receiving a copy of the Monitoring Reports '*is simply not good enough, especially as the MCQ is almost totally mined and is facing closure*'.⁴⁷
38. In relation to the monitoring undertaken by Company A, the applicant submitted:⁴⁸

³⁵ *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-610.

³⁶ *MacMillan and Co Ltd v Cooper* (1923) LR 51 Ind App 109; *Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104.

³⁷ Section 10 (definition of 'artistic work') of the *Copyright Act*.

³⁸ Section 10 (definition of 'drawing') of the *Copyright Act*.

³⁹ Section 10 (definition of 'literary work') of the *Copyright Act*.

⁴⁰ Sections 31(1)(a) and 31(1)(b) of the *Copyright Act*.

⁴¹ Section 36(1) of the *Copyright Act*.

⁴² Part III, Division 3 of the *Copyright Act* – *Acts not constituting infringements of copyright in works*.

⁴³ Section 183(1) of the *Copyright Act*.

⁴⁴ Company A's letter to OIC dated 17 March 2021.

⁴⁵ Council's email to OIC dated 14 December 2020.

⁴⁶ Development permit IPDE00920708. Schedule F relates to the emission of noise.

⁴⁷ Applicant's email to OIC dated 4 January 2021.

⁴⁸ Applicant's email to OIC dated 9 April 2021.

[Company A] technician [X], sets up the equipment and runs the [company name] software, which creates a recording of the vibration.

In these instances, it is the manufacturer's software which is doing the recording.

The information which is being recorded is the seismic effect, not any effect that [Company A] created.

We cannot understand how the OIC can consider this simple measurement as a "work of art", when it is simply a recording of a seismic event, which was not created by [Company A].

- The actual seismic event is the "work of art", which was not created by [X], all he did was to take a snapshot of the blast using other people's software.
- Because the seismic event was physically released into the public domain by [Council], we believe that it is no longer subject to copyright.

Anybody else who measured the blast would have created the exact same document, because the process is conducted using a standard process which must adhere to a specified standard.

- The process of measuring the blast, is a strictly regulated operation, which leaves no ability to create a "work of art", even the monitoring location and the exact process was specified by the [Department of Environment and Science (not Council and not Company A)].
- Please allow me to emphasise, if anybody was to setup blast monitoring device in the same place and with the same standard process, as specified by the [Department of Environment and Science], then they would achieve exactly the same timeline chart.
- There is zero ability to use creativity to create a work of art, the only exception being if it is used for the purpose of falsely monitoring so as to report a reduced effect.
- The produced timeline is not specifically unique, unless it was deliberately altered to reduce the reading.

39. The applicant also submitted that the blasts conducted at MCQ are 'a form of detailed, planned, theatrical-style seismic and decibel performance event' which requires 'a great deal of expertise, experience, licensing, planning, storage and relative timing calculations'.⁴⁹ Further the applicant submitted that as the applicant's chairman was prevented from recording one of the blasts at MCQ on 28 February 2019, this supports the applicant's view that it is the blast that is the 'work of art' and accordingly is protected by copyright,⁵⁰ rather than any information comprised within the Monitoring Reports and copyright rests solely with the company which undertakes the blasting.

40. To the extent that the applicant submits that the blasts conducted at MCQ are the artistic work, I disagree. The information comprised in each Monitoring Report comprises the data from the seismic monitoring at MCQ recorded as both words and figures and a chart. As noted above at paragraph 31, the definition of 'artistic work' comprises 'drawings' and 'drawings' is defined to include charts. The definition of 'literary works' includes a table, or compilation, expressed in words, figures or symbols. In my view the Monitoring Reports meet both the definition for artistic and literary work (**Copyrighted Works**).

⁴⁹ Applicant's email to OIC dated 21 May 2021.

⁵⁰ Applicant's telephone call with a Review Officer on 25 May 2021.

41. I also disagree with the applicant's submission that anyone else who measured the blasts conducted at MCQ would create the same document. While other measurements conducted may record the same data, it is the presentation of that data, through compilation and the charts, in the Monitoring Reports that comprise the Copyrighted Works.
42. The *Copyright Act* requires that the Copyrighted Works be original. There is no information before me to suggest that the Copyrighted Works are not the original work of Company A, or that they were not created by Company A applying its knowledge, judgement, skill or labour.⁵¹ Consequently, I consider it is reasonable to conclude that the Monitoring Reports are original.⁵²
43. As noted at paragraph 33 above, infringement of copyright occurs when a person who is not the owner of the copyright, and does not have the licence of the owner, does or authorises the doing of any act comprised in the copyright.⁵³
44. In relation to the ownership of the copyright the applicant submits:⁵⁴
- ... we believe that the owner of the data, is the person responsible for deliberately specifying non-best practice and possible damage to the seismic recording quality.*
45. To the extent that the applicant submits that ownership to the copyright of the Monitoring Reports has been transferred from Company A to the manager of MCQ and as a result ultimately to Council, on the basis of the applicant's view that the type of monitoring specified by the MCQ manager is not best practice, I disagree. Even if the type of monitoring specified by the MCQ manager is not best practice, I do not consider that this would have the effect of transferring the ownership of the copyright as suggested by the applicant. I also note that there is no other information before me to suggest that Company A is not the copyright owner of the Monitoring Reports.

Express Licence

46. Council submitted that it does not hold a licence from Company A, permitting it to carry out any of the acts that would otherwise be the exclusive right of Company A. In this regard, Council submitted:⁵⁵
- The Council has employed the services of [Company A] since 2002 through a purchase order system with no specific details of contractual arrangements or the report requirements except that there is a verbal understanding that it addresses the requirements of AS 2187 Use of Explosives... Part 2... Appendix J and Council's Environmental Authority Licence conditions to provide a report.*
47. I have reviewed some of the purchase orders (**Purchase Orders**) referred to by Council and I am satisfied that they do not contain any provisions that provide an express formal licence or authority for Council, to undertake any of the exclusive rights of Company A under the *Copyright Act*.⁵⁶

⁵¹ *Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104.

⁵² There is no information before me to suggest that the Monitoring Reports have been published or that the author of the reports is not a qualified person for the purposes of section 32 of the *Copyright Act*.

⁵³ Section 36(1) of the *Copyright Act*.

⁵⁴ Submission to OIC dated 23 April 2021 at page 5.

⁵⁵ Council's letter to OIC dated 31 July 2020.

⁵⁶ Section 31(1)(b) of the *Copyright Act*.

Implied Licence

48. I have also considered whether a licence may be implied into the Purchase Orders between Council and Company A. A licence may be implied by conduct⁵⁷ or by the need to give business efficacy.⁵⁸ In *Hardingham v RP Data Pty Limited*,⁵⁹ the Federal Court of Australia set out the principles that it considers are relevant to whether, after identification of the express terms of an agreement, it is to be implied that a licence was granted and the scope of such a licence.
49. The four principles referred to by the Court are as follows:⁶⁰
- the ordinary contractual principles as to the implication of terms apply
 - a licence of copyright will be implied only to the extent that it is necessary
 - the implication is to be drawn from all the relevant circumstances existing at the time of the agreement, including what the parties then contemplated, objectively assessed; and
 - the onus of establishing infringement lies on the copyright owner with the result that the copyright owner bears the onus of establishing the absence of an express or implied licence.⁶¹
50. In relation to the first two principles referred to in *Hardingham*, there is no information before me to suggest that the Purchase Orders are of a particular class of contract to which a licence may be implied as a legal incident or that the particular circumstances require a licence to be implied to give business efficacy to the Purchase Orders. However, for the reasons given below, I consider that it is arguable that a licence may be implied into the Purchase Orders for the necessity of Council complying with its reporting obligations under the *Environmental Protection Act 1994* (Qld) (**EPA Act**).
51. In relation to the third requirement, the Federal Court stated the implication is to be drawn from all the relevant circumstances existing at the time of the agreement, including what the parties then contemplated, objectively assessed. The Court referred to the case of *Beck v Montana Constructions Pty*,⁶² in which Jacobs J explained his rationale for concluding that there was an implied licence as follows:⁶³
- [T]he engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission, or consent, or licence in the person giving the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement.*
52. The Federal Court stated that:⁶⁴
- the 'purpose' for which the 'material' was to be used is determined objectively by reference to the parties' words and conduct and the circumstances in which the agreement was reached.*
53. The Purchase Orders record that consideration has been paid to Company A by Council for the production of the Monitoring Reports. As noted above at paragraph 51, the courts have been inclined to imply a licence, where it would otherwise be unfair to deprive the

⁵⁷ *Lorenzo & Sons Pty Ltd v Roland Corp* (1992) IPR 376 at 380-2.

⁵⁸ *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

⁵⁹ *Hardingham v RP Data Pty Limited* [2019] FCA 2075, 147 IPR 489 at [44]-[50] (**Hardingham**).

⁶⁰ *Hardingham* at [44]-[50].

⁶¹ As my decision relates to access of documents under the RTI Act and does not relate to an actual claim of infringement, I do not consider that it is necessary for me to consider the fourth principle referred to in *Hardingham*.

⁶² *Beck v Montana constructions Pty* [1964-5] NSW 229 (**Beck**).

⁶³ *Beck* at 235.

⁶⁴ *Hardingham* at [49].

party paying the consideration of the material produced as a result of the parties' agreement.

54. Schedule F of Council's development permit⁶⁵ prescribes that the noise level and ground vibration emanating from a blast conducted at MCQ must not exceed a certain level.⁶⁶ Schedule H places an obligation on Council to monitor its own activities in relation to Schedule F⁶⁷ and self-report (**Exception Report**) to the Department of Environment and Science (**Department**) any blast conducted at MCQ that exceeds any of the limits prescribed in Schedule F.
55. In making an Exception Report, Council is required to provide the full analysis results in relation to any non-compliance to the Department.⁶⁸ The Department may also require Council to provide a copy of a record on request.⁶⁹
56. On the information before me, I consider that the purpose for which Company A creates the Monitoring Reports for Council is for Council to satisfy itself that it is complying with the development permit conditions and its environmental licence, and to enable MCQ to collate technical information to analyse the blasting results and inform future blasting plans. Accordingly, it follows that, in complying with its monitoring obligations under Schedule H, it may be necessary for Council to provide a copy of a Monitoring Report to the Department, if any blast at MCQ exceeded the permitted limits in Schedule F.
57. I consider that, at the time Company A entered into an agreement with Council to provide Council with the reporting data, it is reasonable to expect that the parties would have contemplated that Council may be required at some time in the future, to make an Exception Report to the Department, which would necessitate Council providing the Department with the Monitoring Report in relation to any non-compliant blast. However, taking into account that Company A has included a statement on the Monitoring Reports indicating that it owns the copyright, I consider that, if a licence is to be implied into the Purchase Orders, it would be restricted to the purpose of permitting Council to provide a copy of any relevant Monitoring Report to the Department, if Council was required to make an Exception Report, or for Council to comply with a request from the Department.
58. The applicant considers that it should be given access to a copy of the Monitoring Reports as this will visually indicate how MCQ '*has never once complied with their DA Schedule-F requirements*'.⁷⁰ In making this submission, the applicant has not argued that Council has been required to make an Exception Report to the Department in relation to its Schedule F obligations, or that the Department has required Council to provide copies of the Monitoring Reports. Rather, the applicant's submissions focus on its view that:⁷¹
 - the measurement devices used to measure the blasts should be fixed to the ground using the concrete block method and not soil spikes; and
 - measurement devices should also be placed in the homes of local residents, as conditions F4 to F6 of Schedule F require that monitoring should be conducted in '*any noise sensitive place*'. The applicant submits this will demonstrate that noise

⁶⁵ Permit number IPDE00920708.

⁶⁶ At [F4] to [F6].

⁶⁷ At [H9] to [H16].

⁶⁸ At [H18].

⁶⁹ At [A5].

⁷⁰ Submission to OIC dated 28 April 2021 at page 2.

⁷¹ Applicant's emails to OIC dated 24 August 2019, 12 November 2019, 2 December 2019, 6 January 2020, 13 January 2020, 18 August 2020, 27 November 2020, 4 January 2021, 25 January 2021, 18 February 2021, 3 May 2021, 11 May 2021, 21 May 2021, 13 June 2021, applicant's submission to OIC dated 28 April 2021 at 3-4, 7 and 16 and applicant's emails to Council dated 8 September 2020, 11 September 2020 and 13 September 2020.

levels in private homes located near MCQ exceed the levels prescribed in Schedule F of the development permit.

59. The applicant's submissions are in effect challenging Council's interpretation of its monitoring obligations under its development permit and how Council conducts its monitoring. I do not consider that, at the time of entering into the agreement to provide the Monitoring Reports, it could reasonably have been contemplated by either Council or Company A that a licence would be implied into the Purchase Orders to permit Council to provide copies of the Monitoring Reports to the applicant in these circumstances.
60. Consequently, I do not consider that any implied licence relating to the Department and arising from obligations under the EPA Act would extend to Council copying the Monitoring Reports for the purposes of satisfying the concerns of the applicant, and accordingly I do not consider that Council has an implied licence to reproduce the Monitoring Reports in order to provide access to them pursuant to the RTI Act.
61. In view of my findings above, I consider that, if Council were to copy the Monitoring Reports to provide access to the applicant, this would constitute reproduction in a material form, which would infringe the copyright of Company A.

Fair Dealing

62. The applicant submits that local residents attempted to arrange for Company A to carry out monitoring in private homes located near MCQ. The applicant stated that this request was denied and therefore the applicant has:⁷²

... the right to obtain the [MCQ] Seismic Monitoring Data, for the purpose of determining and reporting the effects on our homes, privacy and mental health.

63. I understand that the applicant undertook private monitoring in one of the homes located near MCQ and accordingly considers that being provided with a copy of the Monitoring Reports will afford the applicant the opportunity of comparing the data comprised in the Monitoring Reports with the data from its own private monitoring.
64. The only provision that could arguably apply in these circumstances is section 41 of the *Copyright Act*, which provides that a fair dealing with Copyrighted Works does not constitute an infringement of the work if it is for the purpose of criticism or review. However, the relevant dealing is Council's dealing, that is, Council's purpose in copying the Monitoring Reports, and not the applicant's dealing, that is the purpose for which the applicant seeks the documents.⁷³ It follows that Council's purpose in copying the Monitoring Reports would be to fulfil its obligation under the RTI Act and not for the purposes outlined in section 41 of the *Copyright Act*.
65. The applicant also submits that one of its members has been served a Show Cause Notice by Council⁷⁴ and the member requires copies of the Monitoring Reports for the purpose of demonstrating to the member's lawyer the 'scale of the seismic and noise effects' from the blasts undertaken at MCQ.⁷⁵ The applicant asked if there is 'a facility where the OIC would release this data to [the] lawyers'.⁷⁶

⁷² Applicant's email to OIC dated 9 April 2021.

⁷³ *Amos v Central Coast Council* [2018] NSWCATAD 101 at [75]; *Sandy v Kiama Municipal Council* [2019] NSWCATAD 49 at [40] and *Hoyts Multiplex Cinemas Pty Ltd v City of Gosnells* [1997] WAICmr 1 at [25]-[30] (**Hoyts**).

⁷⁴ Pursuant to section 167 of the *Planning Act 2016* (Qld).

⁷⁵ Applicant's email to OIC dated 14 June 2021.

⁷⁶ Applicant's email to OIC dated 14 June 2021.

66. Section 43 of the *Copyright Act* provides an exception to infringement in the *Copyright Act*. Specifically, section 43(1) provides that copyright is not infringed by anything done for the purposes of a judicial proceeding or a report of a judicial proceeding. Further, section 43(2) of the *Copyright Act* provides that a fair dealing with an artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by a legal practitioner.
67. This section of the *Copyright Act* has been considered by the Information Commissioner in Western Australia (**WA Information Commissioner**), in relation to an application to an agency for documents relating to a planning and development application.⁷⁷ The access applicant indicated that it would undertake to use the documents only for the purpose of giving legal advice and for the purpose of judicial proceedings, such that copying the documents would not be an infringement of copyright in accordance with section 43 of the *Copyright Act*.
68. The WA Information Commissioner decided that the application of a defence provided by section 43 of the *Copyright Act* is restricted to circumstances in which the party copying the document can establish that the purpose for which the copying is done, is for its purposes, and not that of any other party.⁷⁸
69. I consider the WA Information Commissioner's interpretation of section 43 of the *Copyright Act* is correct. I am of the view that this is supported by section 68(4)(c) of the RTI Act, which provides that if giving access in the form requested by the applicant would involve an infringement of copyright of a person other than the State, access in that form may be refused and given in another form.
70. It follows that it is Council's purpose in copying the Monitoring Reports that must be considered in relation to the fair dealing exception in section 43 of the *Copyright Act*. Council's purpose in copying the Monitoring Reports in the circumstances of this case, would be to fulfil its obligation under the RTI Act and not for the purposes outlined in section 43 of the *Copyright Act*.
71. In view of the above, I do not consider that the fair dealing exceptions to infringement of copyright apply in the circumstances of this matter.

Crown use

72. Section 183(1) of the *Copyright Act* provides that copyright in a work is not infringed by a State doing any of the acts comprised in the copyright if this is done "for the services of the Commonwealth or State". That expression is not defined.
73. As noted by Assistant Information Commissioner Rickard in *V11 and Brisbane City Council*,⁷⁹ it is unclear whether the Crown use provision extends to local governments, such as Council. I am also not aware of any legal authority that supports that view for the purposes of the *Copyright Act*.
74. Based on the material currently before me, I am unable to conclude that Council's copying of the Monitoring Reports for the purpose of providing access to them under the RTI Act would be an act done for the services of the Commonwealth or State falling within the purview of the statutory licence contemplated in the Crown use provision.

⁷⁷ In *Hoyts*.

⁷⁸ *Hoyts* at [25]. In reaching that decision the WA Information Commissioner referred to the decision of Beaumont J in *De Garis and Anor v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, in which Beaumont J considered section 40 of the *Copyright Act*.

⁷⁹ [2021] QICmr 39 (6 August 2021) at [41]-[44].

75. In conclusion, after carefully considering the relevant provisions of the *Copyright Act*, and also taking into consideration that the copyright owner has expressly advised OIC that it is not willing for the applicant to receive copies of the Monitoring Reports, I am satisfied that the Monitoring Reports are subject to copyright and that providing the applicant with a copy of these documents under the RTI Act would constitute an infringement of copyright.
76. Accordingly, I find that access to the Monitoring Reports in the form sought by the applicant (being provided with copies) may be refused and instead given in another form (by way of inspection) under section 68(4)(c) of the RTI Act.⁸⁰

Disclosure Issue

Relevant law

77. Access to documents may be refused to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.⁸¹ The term public interest 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.⁸²
78. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:⁸³
- identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.

Findings

79. In considering the Disclosure Issue (noted at paragraphs 21 - 25 above), I have kept in mind the RTI Act's pro-disclosure bias⁸⁴ and Parliament's intention that grounds for refusing access should be interpreted narrowly.⁸⁵ Also, in my assessment of whether disclosure of the Information in Issue would, on balance, be contrary to the public interest, I have carefully considered the non-exhaustive lists of factors in schedule 4 of the RTI Act, and considered whether any other public interest factors are relevant.
80. I have not taken any irrelevant factors into account in making this decision.⁸⁶

Factors favouring disclosure

81. The applicant submitted that releasing the Information in Issue would allow local residents to '*know how close [Council] plan to blast*' as Council '*are allowed to blast*

⁸⁰ Subject to the redaction of the report author's personal information and blast details as noted at paragraph 19.

⁸¹ Sections 47(3)(b) and 49 of the RTI Act. Section 47(2)(a) of the RTI Act requires the grounds to be interpreted narrowly.

⁸² However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, '*The Public Interest: We Know It's Important, But Do We Know What It Means*' (2006) 48 AIAL Forum 12, 14.

⁸³ Section 49(3) of the RTI Act.

⁸⁴ Section 39 of the RTI Act.

⁸⁵ Section 47(2)(a) of the RTI Act.

⁸⁶ Section 49(3)(d) of the RTI Act.

anywhere inside their KRA-42 Resource Processing area' and will allow local residents to 'gauge how bad the blast will be'.⁸⁷

82. The applicant also submitted that the Information in Issue should be disclosed as it believes that MCQ has a scheme where it can resume its former blasting operations and gravel extraction, by lowering the height of all the mine benches and:⁸⁸

... lowering of the benches, will propagate up the hill towards Scenic Drive, thereby creating instability in Scenic Drive.

83. In this respect, the applicant is concerned that MCQ:⁸⁹

... may have a secret plan to actually remove the uphill section of the much-loved Scenic Drive. By making the area unstable and erosion persistent, this will enable them to close the current uphill road and then later blast it away.

84. Further the applicant submitted that:

- the noise and vibrations within homes near MCQ during a blast 'severely affects the local residents mental and physical health';⁹⁰ and
- there are concerns within the community about MCQ continuing to operate and the ultimate cost of rehabilitation of the site once MCQ discontinues its operations.⁹¹

85. The applicant's submissions give rise to a consideration of the following public interest factors favouring disclosure:

- whether disclosure could reasonably be expected to promote open discussion of public affairs and enhance Council's accountability⁹²
- whether disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;⁹³ and
- whether disclosure could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.⁹⁴

86. I recognise that there is a general public interest in promoting access to government held information. I also acknowledge that Council provides very limited publicly available information in relation to its operations at MCQ.

87. To the extent that the Information in Issue comprises details of the reserves of asphalt aggregate situated at MCQ and accordingly may provide an indication of the expected life of MCQ, I consider it reasonable to expect that disclosure of the Information in Issue will help to promote discussion about MCQ's future operations, enhance Council's accountability in that respect and foster informed debate.

88. I consider that the two factors in favour of disclosure in relation to transparency and accountability and contributing to positive and informed debate attract significant weight,

⁸⁷ Applicant's email to OIC dated 6 January 2020.

⁸⁸ Applicant's email to OIC dated 16 April 2021.

⁸⁹ Applicant's email to OIC dated 16 April 2021.

⁹⁰ Applicant's email to OIC dated 6 January 2020.

⁹¹ See the website of Michael Berkman, MP for Maiwar <https://www.michaelberkman.com.au/quarry>; 'Mt Coot-tha Residents Fight for Quarry Closure, Future Zipline Plans May Be Affected', *Chapel Hill News* (online) <https://chapelhillnews.com.au/mt-coot-tha-residents-fight-quarry-closure-future-zipline-plans-may-affected/>.

⁹² Schedule 4, part 2, item 1 of the RTI Act

⁹³ Schedule 4, part 2, item 2 of the RTI Act.

⁹⁴ Schedule 4, part 2, item 14 of the RTI Act.

embodying as each does the strong public interest in ensuring government in Queensland, including local government is conducted as transparently as possible.⁹⁵

89. I have considered the applicant's concerns about future erosion and instability at MCQ and also the applicant's view that disclosure of the Information in Issue will allow local residents to '*gauge how bad the blast will be*', as part of my deliberation regarding whether the disclosure of the Information in Issue could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.⁹⁶ I note that the applicant made these submissions before receiving the three part-pages of information from the two letters from Company B that Council has since released.⁹⁷
90. While I acknowledge the concerns of the applicant in relation to the effects of any future blasting conducted at MCQ, I note that the Information in Issue comprises advice of a preliminary nature in relation to the reserves of quarry material and the locations of those reserves at MCQ and does not contain any final plans for the future operations at MCQ nor does it contain information about risks to the environment, health risks or measures relating to public health and safety.
91. In view of the above, the Information in Issue does not on its face reveal any environmental or health risks or measures relating to public health and safety. Accordingly, I am satisfied that this pro-disclosure factor does not apply.
92. Finally, as noted at paragraph 79, I have also carefully considered the remaining factors listed in schedule 4, part 2 of the RTI Act and turned my mind to other possible factors favouring disclosure;⁹⁸ however, I am satisfied that no other public interest factors favouring disclosure are relevant in the circumstances of this review.

Factors favouring nondisclosure

93. The RTI Act recognises that factors favouring nondisclosure will arise in circumstances where disclosure of the Information in Issue could reasonably be expected to:
- prejudice the commercial competitive activities of an agency;⁹⁹ or
 - prejudice trade secrets, business affairs or research of an agency or person (together, the **Prejudice Factors**);¹⁰⁰ or
 - cause a public interest harm because disclosure of the Information in Issue –
 - would disclose information concerning the business, professional or 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 the government (**Harm Factor**).¹⁰¹
94. The Prejudice Factors and Harm Factor are directed towards preventing unwarranted commercial disadvantage to:

⁹⁵ A public interest reflected in the very existence of the RTI Act, and Parliament's recognition that in a 'free and democratic society there should be open discussion of public affairs', that information 'in the government's possession or under the government's control is a public resource', and that 'the community should be kept informed of government's operations...': Preamble, sections 1(a)-(c) of the RTI Act.

⁹⁶ Schedule 4, part 2, item 14 of the RTI Act.

⁹⁷ As noted at paragraph 24 above.

⁹⁸ Noting that, given the wording of section 49(3)(b) of the RTI Act, the factors favouring disclosure listed in schedule 4, part 2 of the RTI Act are non-exhaustive.

⁹⁹ Schedule 4, part 3, item 17 of the RTI Act.

¹⁰⁰ Schedule 4, part 3, item 15 of the RTI Act.

¹⁰¹ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

- persons who carry on a commercial activity who supply information to government or about whom government collects information; and
 - agencies which carry on commercial activities.
95. The applicant made extensive submissions throughout the course of the review, focussed on its view that the MCQ should be closed and the area rehabilitated to something akin to The Eden Project in the United Kingdom. The applicant also raised concerns that the cost of rehabilitation of the site would continue to increase for every year that MCQ continued to operate. It is on that basis that the applicant considered that the commercial income generated at MCQ is less than the costs of rehabilitation of the site and as a result the commercial viability of MCQ is '*non-existent*'.¹⁰²
96. The applicant also submitted that MCQ is '*virtually totally "gutted"*' and therefore Council's '*previously used "commercial in confidence" defence now seems invalid*'.¹⁰³ The applicant also considered that '*road gravel is inexpensive and commonly available and is the place for quarries that are not located in Urban Tourism Venues*'.¹⁰⁴
97. The applicant submitted information in relation to the price of asphalt gravel from other competing quarries¹⁰⁵ and relative trucking times and distances,¹⁰⁶ to support its view that it would be more commercially viable to obtain asphalt aggregate from other quarries and rehabilitate MCQ.
98. Further the applicant submitted that OIC should request that Council provide OIC with its '*rehabilitation costings and compare this with their meagre mine-gate profit*' and on that basis '*OIC would be in a much better position to make value judgements on BCC MCQ operations*'.¹⁰⁷
99. While I acknowledge the commitment of the applicant to its views, I am not tasked to decide whether it is more commercially viable for Council to close MCQ and rehabilitate the site into a tourist attraction, rather than continue its current operation as a quarry, nor am I tasked to decide whether other quarries could supply the same products currently supplied by MCQ. Rather, I am required to consider whether the quarry activities at MCQ are a commercial activity of Council and whether disclosure of the Information in Issue would prejudice or harm that commercial activity. In this respect, I note that the applicant has not provided any submissions to address the issue of whether disclosure of the Information in Issue could reasonably be expected to prejudice or harm a commercial activity of Council.

Prejudice Factors

Commercial activity of Council

100. MCQ has been operated by Council since Council's formation in 1926.¹⁰⁸ As noted above the Information in Issue is essentially comprised in two letters to Council, in which advice is provided to Council by Company B in relation to reserves at MCQ.

¹⁰² Applicant's email to OIC dated 6 January 2020.

¹⁰³ Applicant's email to OIC dated 14 January 2021.

¹⁰⁴ Applicant's email to OIC dated 16 April 2021.

¹⁰⁵ Applicant's email to OIC dated 11 May 2021.

¹⁰⁶ Applicant's email to OIC dated 21 May 2021.

¹⁰⁷ Applicant's email to OIC dated 11 May 2021.

¹⁰⁸ Council's letter to OIC dated 31 July 2020 at page 3.

101. Despite the applicant, in its correspondence to Council, appearing to accept that MCQ undertakes a commercial activity on behalf of Council,¹⁰⁹ the applicant subsequently submitted to OIC that it does not believe that MCQ conducts any commercial activities, as it only supplies materials to a named large construction company (**Company C**), and Company C make political donations to the Liberal National Party of Queensland.¹¹⁰ To the extent that the applicant appears to be suggesting that MCQ is not conducting a commercial activity on behalf of Council because it supplies materials to Company C, I disagree. Political donations are irrelevant to the question of whether MCQ conducts a commercial activity on behalf of Council. The applicant's own submission acknowledged that MCQ supplies material to Company C. The supply of goods is a commercial activity.
102. During the external review, Council submitted that it operates two large asphalt plants at Eagle Farm and Riverview, which are supplied by MCQ, and is one of South East Queensland's largest asphalt producers to not only Council, but also the commercial asphalt market.¹¹¹ Additionally, Council submitted that MCQ sells quarry products to commercial customers in a competitive market.¹¹² Based on this information, I am satisfied that the operations undertaken at MCQ are a competitive commercial activity undertaken by Council.
103. Having carefully considered the Information in Issue, I am satisfied that it provides information about the available resources for future quarrying at MCQ, including specific volumes of material that may be extracted from MCQ, and therefore concerns the business or commercial affairs of Council in relation to the future supply of quarry materials and commercial asphalt.

Prejudice business or commercial affairs

104. In relation to whether the release of the Information in Issue could reasonably be expected to prejudice the business affairs or competitive commercial activities of Council, I accept the submissions made by Council that the sourcing of asphalt aggregates from MCQ is a component of the cost of asphalt that Council charges to the commercial asphalt market and that Council competes in a competitive market for the sale of its quarry material. I accept Council's submission that disclosure of the Information in Issue could, given its nature, reasonably be expected to be used by a competitor in the commercial asphalt market to calculate Council's future supply costs of asphalt and undercut those costs, or impinge on Council's future sales of quarry material, resulting in prejudice to the business affairs and competitive commercial activities of Council.
105. I note that the applicant has published OIC's preliminary view on its website¹¹³ and has specifically drawn attention to Council's submission that the sourcing of asphalt aggregates from MCQ equates to approximately forty per cent of the cost of asphalt that Council charges to the commercial asphalt market.¹¹⁴ I consider the effect of publication of the cost ratio information by the applicant increases the prejudice (and harm) that could reasonably be expected to occur from disclosure of the Information in Issue, by providing a commercial competitor with further information about Council's commercial activity and therefore a competitive advantage.

¹⁰⁹ As evidenced by the applicant's email to Council dated 11 September 2020, in which it states a prominent electoral candidate interviewed truck drivers outside MCQ and was advised by the truck drivers that '*none of the MCQ gravel is ever delivered to BCC facilities, all gravel goes to commercial outlets and asphalt factories*'.

¹¹⁰ Telephone call between the applicant and an OIC Officer on 14 December 2020.

¹¹¹ Council's letter to OIC dated 31 July 2020.

¹¹² Telephone call between myself and Council on 28 June 2021.

¹¹³ <http://www.mtcoot-tha.org> (accessed on 10 June 2021).

¹¹⁴ <http://www.mtcoot-tha.org> (accessed on 11 June 2021).

Weight

106. The applicant submitted that the information to which it seeks access is similar to information that has already been released into the public domain by Council. To the extent that the applicant suggests that any commercial prejudice (or harm – discussed under the Harm Factor heading below) that could reasonably be expected to occur from disclosure of the Information in Issue is significantly reduced, due to there being similar information already in the public domain, I disagree. The information referred to by the applicant comprises information that was presented at a conference in 2012. The PowerPoint slides that formed part of the presentation, included diagrams showing the locations of blasts that had occurred at MCQ prior to the presentation. The information in the public domain is old data and does not comprise information relating to material volumes that could be extracted by MCQ in the future and the corresponding values. Consequently, I consider that the prejudice (or harm) that could reasonably be expected to flow from disclosure of the Information in Issue is not diminished.
107. Given the costs that would flow to rate payers in the event of prejudicial impact on Council's business and competitive commercial activities in regard to quarry material and asphalt production, I give significant weight to the prejudice factors favouring nondisclosure of the Information in Issue.

Harm Factor

108. The Information Commissioner has previously found that the adverse effect required by the business affairs harm provision will almost invariably be financial in nature, whether directly or indirectly. Accordingly, in most instances the question of whether disclosure of the Information in Issue could reasonably be expected to cause the necessary prejudice or have the requisite adverse effect will turn on whether disclosure of the information is capable of causing competitive harm to the relevant entity.¹¹⁵

Business or Commercial Affairs of Council

109. As noted at paragraphs 100 to 103 above I am satisfied that the Information in Issue concerns the business or commercial affairs of Council.

Adverse Effect

110. In relation to whether the release of the Information in Issue could reasonably be expected to have an adverse effect or cause competitive harm to Council, I accept the submissions made by Council set out at paragraph 104 above and repeat and rely on my reasons in paragraphs 104 and 105 above, to conclude that disclosure of the Information in Issue could enable a competitor in the asphalt aggregate and quarry materials supply trade to gain a competitive advantage over MCQ in its supply of asphalt aggregate to the plants at Eagle Farm and Riverview, or generally in the quarry materials market, by ascertaining the capacity of MCQ's reserves. Accordingly, I consider that disclosing the Information in Issue would have an adverse effect on the business or commercial affairs of Council.

¹¹⁵ *Kalinga Woolloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd; Treasury Department* (Unreported, Queensland Information Commissioner, 9 May 2012) at [89].

Weight

111. I note the agency's submission set out at paragraph 104 above. For the same reasons set out in that paragraph, and paragraph 105, I consider that the weight to be afforded to the Harm Factor in favour of nondisclosure of the Information in Issue, is significant.

Balancing the public interest

112. As outlined above, I afford the pro-disclosure factors concerning accountability and transparency and contributing to informed debate significant weight.

113. On the other hand, I also afford the nondisclosure factors regarding the commercial and business prejudice and harm factors significant weight.

114. On balance, when taking into consideration the position that disclosure of the Information in Issue under the RTI Act means there can be no restriction on its use or dissemination¹¹⁶ and noting the commercial sensitivity of the information and the implications for rate payers, I consider that the factors favouring disclosure of the Information in Issue are outweighed by the factors favouring nondisclosure in this case.

115. Accordingly, I consider that access to the Information in Issue may be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

DECISION

116. As set out above, I vary the decision under review and find that access to:

- the Monitoring Reports is granted by way of inspection only under section 68(4)(c) of the RTI Act as providing the applicant with a copy of the documents would involve an infringement of the copyright of a person other than the State; and
- the Information in Issue identified above can be refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest.

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

Assistant Information Commissioner Corby

Date: 27 September 2021

¹¹⁶ As observed by Judicial Member McGill SC in *FLK v Information Commissioner* [2021] QCATA 46 at [17]. While the observation was made in relation to the IP Act, I consider the observation is equally applicable to access of information obtained via the RTI Act.

APPENDIX

Significant procedural steps

| Date | Event |
|-------------------|--|
| 26 August 2019 | OIC received the applicant's external review application. |
| 27 August 2019 | OIC notified the applicant and Council that the external review application had been received and requested procedural information and documents from Council. |
| 27 August 2019 | The applicant contacted OIC. |
| 27 August 2019 | Council provided OIC with the procedural information. |
| 6 September 2019 | OIC sought further information from Council, and Council provided this. |
| 24 September 2019 | OIC notified the applicant and Council that the external review had been accepted and requested the information in issue from Council. |
| 30 September 2019 | Council provided the information in issue to OIC. |
| 11 October 2019 | The applicant provided OIC with information in relation to its view about the cost of rehabilitation at MCQ. |
| 1 November 2019 | The applicant provided OIC with information in relation to why it considers it should be provided access to all information requested. |
| 8 November 2019 | OIC wrote to Council requiring it to carry out further searches to locate documents responsive to the applicant's access application and requested that it provide further information in relation its decision to refuse to deal with Item 2 of the applicant's access application. |
| 8 November 2019 | OIC wrote to the applicant to provide an update, to explain to the applicant OIC's role on external review and to confirm that OIC does not have the ability to require an agency to answer questions or provide explanations about documents. |
| 12 November 2019 | The applicant contacted OIC and provided information about the measurements of previous blasts conducted at MCQ. |
| 19 November 2019 | Council provided OIC with copies of its decisions in relation to the applicant's previous access applications. |
| 19 November 2019 | Council contacted OIC requesting an extension of time in which to provide a response to OIC's letter dated 8 November 2019. |
| 19 November 2019 | OIC agreed to provide Council with an extension of time to provide a response to OIC's letter dated 8 November 2019. |
| 2 December 2019 | The applicant contacted OIC and provided information as to why it considers it should be provided with further information and also requested that OIC conduct an investigation into why the Department of Environment and Science had ignored a recommendation for conducting its own monitoring. |
| 3 December 2019 | Council provided OIC with a copy of the Monitoring Reports located as a result of conducting further searches. |

| Date | Event |
|------------------|---|
| 9 December 2019 | OIC contacted the applicant to provide an update and reiterated OIC's role on external review. |
| 10 December 2019 | The applicant provided OIC with information in relation to why it considers it should be provided access to all information requested. |
| 13 December 2019 | The applicant provided OIC with a copy of its MCQ ' <i>Rehabilitation Spreadsheet</i> '. |
| 6 January 2020 | The applicant provided OIC with information in relation to why it considers it should be provided access to all information requested. The applicant also requested that OIC require Council to provide residents local to MCQ with details of the estimated strengths of future blasts, when Council sends out its notice of blast emails to local residents. |
| 7 January 2020 | The applicant sent OIC an email addressed to the Queensland Ombudsman. |
| 13 January 2020 | The applicant provided OIC with its analysis of previous blast vibration data and information in relation to its view that all monitoring conducted must adhere to Schedule F of MCQ's development permit. |
| 16 January 2020 | The applicant provided OIC with further information to support its view that Council should provide local residents with information about the planned blast strength in its notice of blast emails sent out to local residents. |
| 20 January 2020 | OIC wrote to Council requiring: <ul style="list-style-type: none"> • further information in relation to its decision to refuse access to the information in Item 2 of the applicant's access application, on the ground that the applicant had made a previous application for the same documents; and • seeking clarification in relation to the date referred to in one of the Monitoring Reports located by Council. |
| 29 January 2020 | OIC provided the applicant with an update by telephone and also explained OIC's role on external review. |
| 7 February 2020 | The applicant contacted OIC requesting access to the documents provided to OIC by Council. |
| 10 February 2020 | OIC received Council's response to OIC's letter dated 20 January 2020. |
| 17 February 2020 | The applicant emailed OIC, asking if OIC could provide an opinion on the applicant's request that Council include the estimated blast strength in its notice of blast emails to residents local to MCQ. |
| 26 February 2020 | The applicant telephoned OIC and requested an update. |
| 27 February 2020 | OIC provided the applicant with an update and advised that OIC cannot request or direct Council to include further information in the emails it releases to residents local to MCQ. |

| Date | Event |
|-------------------------------|--|
| 30 March 2020 | The applicant emailed OIC, requesting access to the documents provided to OIC by Council and also requesting access to the 'Event Reports' (Event Reports) created in response to the blasts conducted at MCQ. ¹¹⁷ |
| 14 April 2020 | OIC contacted Council and sought clarification of Council's submission dated 3 December 2019 and required Council to conduct searches to locate the Event Reports. |
| 15 April 2020 | OIC provided the applicant with an email update. OIC received an acknowledgment email from the applicant. |
| 2 May 2020 | The applicant emailed OIC, advising that it was simply seeking access to the Monitoring Reports. |
| 12 May 2020 | OIC contacted Council to request a response to OIC's letter dated 14 April 2020. |
| 26 May 2020 | The applicant telephoned OIC and requested an update. |
| 27 May 2020 | OIC contacted Council to request a response to OIC's letter dated 14 April 2020. |
| 27 May 2020 | OIC provided the applicant with an update. |
| 28 May 2020 | Council emailed OIC, seeking a further extension of time to respond to OIC's letter of 14 April 2020. |
| 28 May 2020 | The applicant emailed OIC, requesting access to documents that fall outside the scope of its access application. |
| 2 June 2020 | OIC received Council's response to OIC's letter dated 14 April 2020. |
| 15 June 2020 | OIC wrote to Council requesting further information in relation to Council's 28 May 2020 submission. |
| 10 July 2020, 31 July 2020 | OIC contacted Council to request a response to OIC's letter dated 15 June 2020. |
| 31 July 2020 | OIC received Council's response to OIC's letter dated 15 June 2020. |
| 13 August 2020 | OIC provided the applicant with an update. The applicant emailed OIC, advising that it had made a new access application to Council. |
| 18 August 2020 | The applicant emailed OIC, providing information as to why it considers it should be provided with the Monitoring Reports. |
| 3 September 2020 | The applicant emailed OIC, requesting that OIC provide it with copies of the documents OIC had received from Council or alternatively provide the applicant with a description of the documents. |
| 7 September 2020 | OIC conveyed a preliminary view to Council concerning access to information comprised in the 17 pages of documents forming part of the Extraction Plan. OIC provided an update to the applicant. |

¹¹⁷ Access to these reports was addressed in OIC's preliminary view dated 8 April 2021, the applicant did not raise any objections to OIC's preliminary view in this respect.

| Date | Event |
|---|--|
| 8 September 2020 | The applicant copied OIC into an email it sent to Council in relation to blasts conducted at MCQ on 18 June 2020 and 3 September 2020. OIC was subsequently copied into an acknowledgment email from Council to the applicant. |
| 11 September 2020, 13 September 2020, 19 September 2020 | The applicant copied OIC into its emails to Council in response to Council's email dated 8 September 2020. |
| 1 October 2020 | OIC contacted Council to request a response to OIC's letter dated 7 September 2020. |
| 3 October 2020 | The applicant emailed OIC, providing information in relation to its complaint to Council about victimisation of the chairperson of the applicant. |
| 6 October 2020 | OIC granted Council an extension of time to provide a response to OIC's letter dated 7 September 2020. |
| 25 November 2020 | OIC contacted Council requesting a response to OIC's letter dated 7 September 2020. |
| 26 November 2020 | Council provided OIC with its response to OIC's letter dated 7 September 2020. |
| 27 November 2020 | OIC contacted Council seeking clarification in relation to Council's mark-up of the Monitoring Reports. OIC provided an update to the applicant. |
| 27 November 2020 | The applicant emailed OIC, providing information as to why it considers the Monitoring Reports should be disclosed to it. |
| 11 December 2020 | The applicant contacted OIC and requested an update by telephone. |
| 14 December 2020 | Council provided OIC with its response to OIC's email dated 27 November 2020. OIC provided the applicant with an update by telephone. |
| 22 December 2020 | OIC contacted Council requesting further information from Council in relation to its view that access should be refused to some information in the Monitoring Reports. |
| 4 January 2021 | The applicant provided OIC with its response to Council in relation to a report from an independent company which concluded that the blasts conducted at MCQ had not resulted in any property damage. |
| 14 January 2021 | The applicant provided OIC with a copy of its correspondence to Council in relation to its complaint that it considers that Council has never complied with Schedule F of the development permit. |
| 18 January 2021 | OIC provided the applicant with an update. |
| 25 January 2021 | The applicant provided OIC with its 'final' complaint email to Council. |
| 28 January 2021 | OIC contacted Council to request a response to OIC's letter dated 22 December 2020. |
| 1 February 2021 | The applicant copied OIC into an email to Council in relation to another access application that Council was processing. |

| Date | Event |
|-------------------------------------|--|
| 2 February 2021 | The applicant emailed OIC, raising concerns about its other access application with Council. |
| 3 February 2021 | OIC contacted the applicant to explain that OIC cannot provide any advice in relation to an application being processed by Council. |
| 4 February 2021 | OIC received an acknowledgement email from the applicant. |
| 4 February 2021, 8 February 2021 | The applicant copied OIC into its email to Council in relation to its other access application. |
| 11 February 2021 | OIC consulted with Company A in relation to the release of some of the information comprised within the Monitoring Reports. OIC contacted Council and requested that it release a marked-up copy of the relevant Monitoring Reports to Company A. |
| 11 February 2021 | Council confirmed to OIC that it had provided Company A with a marked-up copy of the Monitoring Reports. |
| 18 February 2021 | The applicant emailed and telephoned OIC, requesting a copy of the documents by the following day. OIC provided the applicant with an update. The applicant sent a further email to OIC in relation to its complaint about Council to the Human Rights Commission. |
| 19 February 2021 | The applicant emailed OIC, advising that it required the documents responsive to its access application as part of the processing of its complaint to the Human Rights Commission. |
| 22 February 2021 | The applicant copied OIC into its email to Council in relation to its other access application being processed by Council. |
| 11 March 2021 | OIC provided the applicant with an update. |
| 12 March 2021 | OIC contacted Council providing OIC's view that Council had not met the onus to satisfy OIC that access should be refused to some of the information in the Monitoring Reports. ¹¹⁸ |
| 17 March 2021 | Company A provided a response to OIC. |
| 31 March 2021 | The applicant emailed OIC, requesting that information be released that day. |
| 1 April 2021 | The applicant telephoned OIC requesting an update. The applicant also emailed OIC, requesting an update in relation to its other access application being processed by Council. OIC provided an external review update to the applicant and advised that it could not provide advice in relation to its access application with Council. |
| 6 April 2021 | OIC provided an update to the applicant, as requested by the applicant. |

¹¹⁸ Section 87(1) of the RTI Act.

| Date | Event |
|---|---|
| 8 April 2021 | <p>OIC provided a preliminary view to the applicant.</p> <p>OIC contacted Council to request that it release some information to the applicant and arrange for the applicant to inspect the Monitoring Reports.</p> <p>Council provided OIC with an acknowledgment email.</p> <p>The applicant emailed OIC, stating that it was not satisfied with inspecting the Monitoring Reports.</p> |
| 9 April 2021 | The applicant provided a submission to OIC. |
| 12 April 2021 | The applicant and Council copied OIC into the emails between them in relation to inspection of the Monitoring Reports. |
| 12 April 2021 | OIC provided the applicant with a response to comments and queries raised in the applicant's emails dated 8 and 9 April 2021. |
| 13 April 2021 | The applicant copied OIC into its email to Council in which the applicant made submissions to Council in relation to the refused information. |
| 14 April 2021 | The applicant emailed OIC, requesting that it be provided with access to the refused information. |
| 15 April 2021 | OIC provided a response to the applicant's request to be provided with access to the refused information. |
| 16 April 2021 | The applicant emailed OIC, advising that it would be in a position to provide a submission the following week. |
| 21 April 2021, 23 April 2021 | The applicant copied OIC into its emails to Council in relation to the refused information. |
| 28 April 2021, 3 May 2021, 4 May 2021 | The applicant provided a submission to OIC. |
| 7 May 2021 | The applicant copied OIC into its email to Council in relation to inspection of the Monitoring Reports. |
| 11 May 2021, 12 May 2021 | The applicant provided a submission to OIC. |
| 17 May 2021 | The applicant provided a submission to OIC, in which it requested that it be provided with a copy of a letter from Council. |
| 19 May 2021 | OIC wrote to the applicant in relation to its submissions and its request that it be provided with a copy of the letter from Council. |
| 21 May 2021 | The applicant provided a submission to OIC. |
| 24 May 2021 | The applicant telephoned OIC and requested an update. |
| 25 May 2021 | OIC provided the applicant with an update. |
| 27 May 2021 | The applicant provided a submission to OIC. |
| 31 May 2021 | OIC provided an update to the applicant. |
| 9 June 2021 | OIC contacted Council to request a copy of Council's purchase orders with Company A. |

| Date | Event |
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| 14 June 2021 | The applicant sent two emails to OIC. |
| 15 June 2021 | OIC provided an update to the applicant. |
| 28 June 2021 | OIC contacted Council to seek further information in relation to its commercial prejudice submission. |
| 12 July 2021 | OIC contacted Council requesting a response to OIC's email dated 9 June 2021. |
| 15 July 2021 | Council provided OIC with a copy of a current purchase order. |
| 16 July 2021 | Council provided OIC with copies of some of the purchase orders relevant to the time period of the Monitoring Reports. |
| 22 July 2021 | The applicant emailed OIC, requesting an update. |
| 26 July 2021 | OIC provided an update to the applicant. |
| 22 August 2021 | The applicant provided a submission to OIC. |
| 24 August 2021 | The applicant copied OIC into an email to Council in which it complained about the blast that was conducted at MCQ that day. |
| 13 September 2021 | The applicant emailed OIC, requesting an update. |
| 16 September 2021 | OIC provided an update to the applicant. |