

Disclosure and Use of Information Obtained in Administering the Rail Safety Act Policy



INDEPENDENT
TRANSPORT
SAFETY AND
RELIABILITY
REGULATOR

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1. Purpose

The NSW Independent Transport Safety and Reliability Regulator (ITSRR) has the principal objective of facilitating the safe operation of transport services in New South Wales. This is achieved through regulation of the rail industry in accordance with the *Rail Safety Act 2008* and supporting regulations, guidelines and policies, and promotion of safety as a fundamental objective in the delivery of transport services.

The purpose of this policy is to:

- explain how the ITSRR interprets its obligations in relation to the safeguarding of information as required under section 162 of the Act and the information that may be released under section 162(2);
- describe the systems it has in place to enable the ITSRR, its current and past employees and contractors to comply with this obligation of non-disclosure; and
- ensure that the ITSRR adopts a consistent approach to the disclosure and use of information.

Underlying this policy is section 162 of the Act which protects the providers of information by limiting further disclosure to other persons by the ITSRR, its officers, employees and others. Under section 162, it is an offence for those who are, or have been, engaged in the administration of the Act to disclose or communicate information obtained in that administration except in specified circumstances.

2. Scope

The ITSRR, its officers, employees and others have wide powers to obtain information in the course of administering the *Rail Safety Act 2008*.

The information gathered to support the ITSRR's rail safety regulatory function is provided by industry for a wide range of purposes including:

- regular safety management system reporting requirements, such as safety performance reports;
- specific incidents, for example notification of occurrences;
- an application for accreditation or variation of accreditation process which may include material viewed by the operator as commercially sensitive;
- notification of change; and
- personal information (eg positive drug and alcohol test notifications, section 104 names and addresses of persons committing an offence against a rail safety law; employee details; training participant details and details relating to competence of rail safety workers).

This policy outlines the way in which information the ITSRR collects in administering the Act must be treated and the circumstances in which certain information may be disclosed. It covers all documents and electronic records and other information held, created and collected by the ITSRR.

All people currently or previously involved in administering the Act should comply with this policy, including:

- rail safety officers;
- people assisting rail safety officers;
- people authorised by the ITSRR or a rail safety officer under a particular provision of the Act to act under that particular provision of the Act;
- delegates of the ITSRR;
- employees of the ITSRR;
- people (including contractors) engaged to provide services to, or on behalf of, the ITSRR and
- people employed by, or engaged to provide services to, a third party engaged to provide services to the ITSRR,

to ensure that they comply with the requirements of section 162 of the Act.

3. Definitions

Act means the *Rail Safety Act 2008* (NSW).

corresponding law means a law of a jurisdiction other than NSW which is substantially similar to the Act.

corresponding rail safety law means a law relating to rail safety of a jurisdiction other than NSW which is substantially similar to the Act .

rail safety law means a provision of the Act and the Regulations

rail safety officer means a person appointed by the ITSRR as a rail safety officer under Part 8 of the Act.

rail transport operator has the meaning given to it in the Act.

railway operations has the meaning given to it in the Act.

Regulations means the *Rail Safety (General) Regulation 2008* (NSW). Any references to the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* and the *Rail Safety (Offences) Regulation 2008* will be in full.

train safety record has the meaning given to it in section 75 of the Act.

train safety recording has the meaning given to it in section 75 of the Act.

4. Legislative framework

Under section 162 information obtained in the administration of the Act must not be disclosed or communicated by the person who obtained the information or otherwise. A penalty applies for breaches of this obligation.

However, section 162(2) permits disclosure of information obtained in the administration of the Act which is:

- required or authorised under the Act or other legislation; or
- made with the consent of the person from whom the information was obtained or to whom the information relates; or
- in connection with the administration of rail safety laws or corresponding rail safety laws; or
- for law enforcement purposes, rail safety inquiries or public safety; or
- as ordered by a court or made in connection with any legal proceedings; or
- in accordance with the Regulations.

The other broad exception at section 162(3) relates to disclosure made in connection to the ITSRR's or a similar regulator's authorisation of the use of aggregate data for research or education.

There is a range of provisions in the Act which permit or require disclosure of information obtained in the administration of the Act. This is important to note in connection with the exceptions provided by section 162(2) and listed above. In particular, section 156 provides for exchange between the ITSRR and other agencies of certain types of information needed in their exercise of regulatory functions.

5. Policy statement/s

This section outlines the ITSRR's policy on disclosure and communication of information based on the requirement in section 162.

5.1 Information that must not be disclosed or communicated

As explained above, persons within the scope of section 162 have a legislative duty not to disclose or communicate information obtained in the administration of the Act. The Act does not specify the type of information which must not be disclosed, or how the ITSRR must go about protecting information.

In the absence of this detail in the legislative provision, the ITSRR interprets the information that cannot be disclosed or communicated as being all information

obtained by past or present employees or contractors of the ITSRR from any person, including information:

- which is commercially sensitive;
- obtained for the specific purposes of its regulatory functions under the Act such as:
 - audit reports;
 - safety performance reports; and
 - train safety records.
- which is personal information.

The last category of information is not covered under this policy. The ITSRR, through its Privacy Management Plan complies with the Information Privacy Principles under the *Privacy and Personal Information Protection Act 1998*.

5.2 Information that may be disclosed or communicated

The ITSRR will not disclose or communicate information unless it falls into one of the categories detailed below as specified in section 162(2).

5.2.1 As required or authorised under the Act or other legislation (s162(2)(a))

The non-disclosure rule in section 162 does not apply where the Act requires a person to disclose information obtained in the administration of the Act or authorises a person to do so.

For example, section 156 of the Act specifically enables the ITSRR to enter into information sharing arrangements with:

- the WorkCover Authority;
- the Chief Investigator of the *Office of Transport Safety Investigations* or
- bodies prescribed for this purpose by the Regulations, being
 - a regulator under a corresponding rail safety law;
 - Comcare; and
 - the NSW Police Force.

The ITSRR may disclose information (including information obtained in the administration of the Act) to the other party to such arrangements if the information relates to:

- possible breaches of the Act or Regulations;
- the safe carrying out of railway operations; and
- any other information that may be prescribed by the Regulations

but only to the extent that the information is reasonably necessary to assist the ITSRR's exercise of its statutory functions or the other party's exercise of its functions.

Other instances in which the ITSRR may disclose information under the section 162(2)(a) exception include:

- section 41 Co-ordination between ITSRR and other Rail Safety Regulators: The ITSRR is authorised to communicate with regulators operating under corresponding laws in the context of accreditation applications received from persons accredited, or seeking accreditation, under that corresponding law.
- section 60(5) Private sidings: Exemption from accreditation: The ITSRR must keep a register of private sidings available for public inspection.
- section 62 Industry safety reports: The ITSRR must, in each year, provide the Minister with an industry safety report on the carrying out of railway operations by accredited persons. Such reports must include information on the development of rail safety, improvements or changes to rail safety and matters prescribed by the Regulations.
- section 76 Disclosure of train safety record to Commonwealth or Commonwealth authority: The ITSRR and a current or previous rail safety officer may disclose all or part of a train safety record to the Commonwealth or one of its authorities, if the Minister consents.
- section 78 Disclosure of train safety recordings: Any person within the scope of section 162 may communicate a train safety recording, or any information obtained from such a recording, to any person in the course of an inquiry or investigation into an accident or incident under Part 4 of the Act.

In addition, the section 162(2) exception extends to circumstances where legislation other than the Act requires or authorises disclosure of information obtained in the administration of the Act. Examples include:

- *Freedom of Information Act 1989 (FOI)*: The ITSRR will determine whether to grant access to information applied for in compliance with the procedure required under the FOI using a presumption in favour of access except where there is a special need to protect the privacy of the information as a result of certain personal, commercial or organisational sensitivities.
- *Transport Administration Act 1988 (TAA)*: The ITSRR is authorised under section 42L of the TAA to disclose information obtained in the administration of that Act if it thinks it:
 - necessary for the safe operation of a transport service; or
 - desirable for the promotion of the safe operation of a transport service, without identifying a person's name.

5.2.2 With consent of the person from whom the information was obtained or to whom the information relates (s162(2)(b));

The ITSRR will attempt, as far as reasonably practicable, to obtain written consent for the release of information that would otherwise be restricted in terms of disclosure under the Act. This is based on the fact that information, which is not subject to any other exceptions in section 162(2), cannot be disclosed or communicated unless consent is obtained.

The ITSRR has formal procedures for seeking consent to release information from the originator of the information or from people to whom the information relates.

5.2.3 In connection with the administration of rail safety law and corresponding rail safety laws (s162(2)(c))

The ITSRR views this exception as confirming ITSRR's right to disclose any information obtained in the administration of the Act for the purposes of administration of the Act (and the Regulations) and any corresponding rail safety law, by the ITSRR or any other authorised entity.

While this is a potentially broad exemption to the section 162 prohibition, the ITSRR perceives it as a necessary part of ensuring rail safety and carrying out its regulatory duties with effectiveness and expediency.

This exemption is similar to the exemption of section 162(2)(a) in that each allow disclosure of information wherever needed under the Act. As such, the examples provided in section 5.2.1 of this policy relating to particular provisions of the Act also apply to this exemption. Notwithstanding this similarity, the two exceptions differ in that section 162(2)(c) also extends to disclosure of information in connection with "corresponding rail safety laws". For example, under section 162(2)(c) disclosure would be permitted in the following cases:

- communication of details relating to an operator accredited in NSW and another jurisdiction to a regulator concerned with the rail safety of that other jurisdiction and which requires such information to properly administer the corresponding rail safety law; and
- communication of details of a notifiable occurrence, accident or other matter possibly involving a contravention of a corresponding rail safety law to the relevant regulator and officers of the other jurisdiction.

5.2.4 For law enforcement purposes, rail safety inquiries or public safety (s162(2)(d))

The ITSRR or persons within the scope of section 162 (eg rail safety officers) may release information where the overarching principle of improving safety outcomes applies. This section enables disclosure for the purposes of law enforcement, rail safety inquiries or public safety. For example:

- under section 85 of the Act rail safety officers may enter premises for compliance and investigative purposes or in emergencies. Rail safety officers are free to disclose information obtained in administering the Act if needed to carry out these general law enforcement powers.
- under section 69 of the Act, rail safety inquiries are carried out by a Board of Inquiry, established by the Minister. Rail safety officers and others covered by section 162 are permitted to disclose information to the Board or otherwise in connection with such rail safety inquiries.

Where the ITSRR is required to make a judgement as to whether a disclosure of information falls into the category of 'public safety', it will take into account certain factors, including the following:

- whether there has been a breach of a statute;
- comparisons with performance of similar organisations;
- the benefits of having public access to information;
- the need to inform and contribute to public debate;
- whether the information is time sensitive;
- whether the information could be obtained by inquiry or diligent investigation (ie it is already in the public domain); and
- the financial impact on the various parties if the information is disclosed.

5.2.5 To a court or in connection with any legal proceedings (s162(2)(e))

The ITSRR and other persons covered by section 162 will comply with all court orders concerning the disclosure or communication of information.

The ITSRR and other persons covered by section 162 may also disclose information in connection with any legal proceedings.

5.2.6 In accordance with the Regulations (s162(2)(f))

Under the Regulations the ITSRR is required to provide the Chief Investigator with access to any details of a notification of an occurrence.

Under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, testing officers (who may be rail safety officers) are authorised to disclose information obtained in the administration of the Act for the purposes of testing rail safety workers for compliance with drug and alcohol obligations.

The ITSRR will ensure that any future provisions of this nature in the Regulations are clearly communicated to past and present employees and contractors.

5.3 Determining whether information may be disclosed or communicated

This policy will form the basis of determining whether information obtained in administering the Act may be disclosed or communicated.

The ITSRR will work from the premise that all information obtained in administering the Act is not to be disclosed unless:

- the ITSRR determines otherwise because of s162(2)(a) and s162(2)(c)-(f); or
- the ITSRR obtains the consent of the person from whom the information is received or to whom the information relates in accordance with s162(2)(b).

The determination process includes:

- ensuring that all information that should not be disclosed or communicated, as described in section 5.1 above, is identified and then assessed to identify information that falls into the exempt categories described in section 5.2;
- if a practical need or benefit exists and the information is not exempt, seeking consent to disclosure from persons from whom the ITSRR obtained the information or to whom the information relates.

The ITSRR has established and implemented a business process for the consideration, review and publication of any external information received by the ITSRR incorporating the requirements of section 162.

5.4 Privacy management

The ITSRR complies with obligations concerning the privacy of personal information under the *Privacy and Personal Information Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW). In accordance with these obligations, the ITSRR has prepared and published a Privacy Management Plan outlining its policy on compliance with this legislation.

The plan may be found online at:

<http://www.transportregulator.nsw.gov.au/privacy.html>

5.5 Compliance initiatives

The ITSRR is committed to helping its employees and contractors comply with this policy. It will do this through a range of strategies including, but not limited to:

- posting the policy on the intranet and notifying employees and contractors of the promulgation of the policy and where they may access it;

- incorporating the policy in its employee induction package;
- including the need to comply with the policy in all agreements with contractors;
- conducting awareness raising sessions for employees to introduce them to the policy and compliance requirements;
- providing training to employees with document handling/processing duties; and
- clearly articulating the responsibilities for managers to monitor compliance with the policy.

5.6 Consultation

Information sharing and disclosure of information for proper purposes relating to the administration of the Act are key to the effective operation of a regulatory regime.

Within the legislative framework covering the use and disclosure of information, the ITSRR is open to and encourages consultation on matters about which rail transport operators or other affected parties have concerns.

6. Roles and responsibilities

All people currently or previously involved in administering the Act as listed in section 2 have an obligation to comply with the requirement not to disclose information obtained by them in the administration of the Act, other than as expressly permitted or for the purposes of administering the Act. These people should comply with this policy.

In determining whether disclosure of information obtained in administering the Act is permitted, regard should be given to:

- *Transport Administration Act 1988*;
- *Freedom of Information Act 1989*;
- *Rail Safety Act 2008*;
- *Passenger Transport Act 1990*;
- The Premier's Department, Freedom of Information Manual;
- *Privacy and Personal Information Protection Act 1998*;
- *Health Records and Information Privacy Act 2002*;
- New South Wales Ombudsman's Guidelines for Freedom of Information (FOI) applications;
- ITSRR Privacy Management Plan;
- *Annual Report (Statutory Bodies) Act 1984 No 87*;

- Annual Report (Statutory Bodies) Regulation 2000; and
- *Public Finance and Audit Act 1983* No 152.

7. Supporting documentation

- ITSRR Privacy Management Plan
- ITSRR Policy on the Release of Information to the Public

8. Approval/review/amendments history

Amendment/ Review No	Version No.	Amended by	Description
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Approved
Carolyn Walsh
Chief Executive