



**Government
of South Australia**

SafeWork SA

OPERATIONAL POLICY

CONFIDENTIALITY OF INFORMATION AND DOCUMENTS OBTAINED BY INSPECTORS IN THE COURSE OF THEIR WORK

Under The Work Health & Safety Act 2012 (SA)

January 2013

Definitions

HSR	Means a Health & Safety Representative elected under Part 5, Division 3 of the <i>Work Health & Safety Act 2012 (SA)</i>
IRC	Means Industrial Relations Court of South Australia
PCBU	Means person conducting a business or undertaking as described in the <i>Work Health & Safety Act 2012 (SA)</i>
Regulator	Means the Executive Director of SafeWork SA
SWSA	Means SafeWork SA
WHS Act	Means the <i>Work Health & Safety Act 2012 (SA)</i>

Purpose

This policy provides guidance to inspectors about applying the confidentiality provisions of s.271 of the *Work Health and Safety Act 2012 (SA)* (the WHS Act) to their work.

Note: *Whilst the provisions in s.271 of the WHS Act also apply to other persons who obtain information or gain access to a document in exercising any power of function under the WHS Act (other than Part 7 when dealing with entry permit holder issues) including the regulator, other staff of SafeWork SA, and HSR's, this policy is directed at inspectors. Non inspectors may gain some information from this policy, but should seek other guidance or advice about the application of s.271 of the WHS Act in relation to their work or functions.*

Background

Section 271 of the WHS Act sets out a range of provisions that apply if an inspector obtains information or gains access to a document in exercising any power or function under the WHS Act.

Section 271 of the WHS Act expressly provides that these confidentiality provisions do not apply to information obtained or documents accessed by the inspector under Part 7 of the WHS Act; it is however, SWSA's policy that inspectors should treat such information and documents in the same way as any other information or documents.

The reference to Part 7 as an exception in s.271 of the WHS Act is understood to reflect that s.148 of the WHS Act sets out similar confidentiality provisions. Section 148 provides that a person must not use or disclose information or a document obtained under Division 2 of Part 7 of the WHS Act, *Entry to inquire into suspected contravention*, for an unrelated purpose unless specified circumstances exist. However, the role of inspectors in relation to Part 7 of the WHS Act is set out in s.141 of the Act. Accordingly, s.148 confidentiality provisions are not considered to apply to inspectors.

Inspectors obtain information or gain access to documents in the following circumstances:

- while exercising their functions under Part 5 of the WHS Act when requested to do so:
 - when deciding matters related to determination of work groups; or
 - while assisting negotiations for work groups in multiple businesses or undertakings; or
 - when deciding which course of training a HSR is to attend and what fees and associated costs the PCBU must pay; or
 - while assisting in resolving unresolved WHS issues at workplaces; or
 - while assisting in resolving issues relating to access to a workplace by a person assisting a HSR; or
 - while assisting in resolving an issue arising in relation to a cessation of unsafe work; or
 - when reviewing a disputed Provisional Improvement Notice; and
- while exercising their functions under Part 7 of the WHS Act when requested to do so to assist in resolving a right of entry dispute; or
- during investigation of contraventions of the WHS Act and WHS Regulations and assisting in prosecution of offences;
- when attending a coronial inquest in respect of a work-related death; and
- when exercising their power of entry under the WHS Act and any of the other general and specific inspector powers under Part 9 of the WHS Act.

Section 271 of the WHS Act limits how inspectors can use information obtained or documents accessed, and the extent to which they can disclose the information or give access to the documents. Individual inspectors could be subject to a maximum penalty of \$10,000 for contravening either of subsections 271(2) or (4) of the WHS Act.

Names of complainants

Section 271(4) of the WHS Act provides that an inspector must not intentionally disclose to another person the name of an individual who has made a complaint in relation to that other person, unless the complainant consents or disclosure is required by law.

The complainant's consent (if given) may have been obtained by another area within SWSA (such as the Help Centre), or directly by the inspector. However, if consent is not given (or sought) and the disclosure is not expressly required by law, inspectors **must not** identify the complainant to any other person to whom the complaint is related.

Regulators policy

Most matters dealt with by an inspector will be handled without disclosing information about the complainant. It is considered sufficient that inspectors indicate to relevant parties that they are conducting inquiries into the specific subject matter at the relevant workplace.

It is considered however, that it is most likely necessary to identify the name of a complainant in order for an inspector to make appropriate inquiries to fully deal with the matter complained about when the complainant is alleging specific personal impact (e.g. when the complainant is alleging that they have been the subject of bullying or harassment which may be a contravention of s.19(1) of the WHS Act; or when the complainant is alleging that they have been the subject of prohibited discriminatory conduct which may be a contravention of s.104(1) of the WHS Act). In such cases, express consent to identify their name must first be obtained from the complainant before any action is taken to make inquiries to address the allegation. If consent is not obtained, the inspector may only be able to deal with the matter at a broad, systematic level at the workplace and not deal with the specific allegation made by the complainant.

Other information obtained/documents accessed by inspectors

Section 271(2) of the WHS Act provides that unless allowed by s.271(3), inspectors **must not**:

- a) disclose information or contents of or information contained in the document to anyone else; or
- b) give access to the document to anyone else; or
- c) use the information or document for any purpose.

Section 271(3) of the WHS Act does however, provide that an inspector may disclose information, give access to a document, or use information or a document in the following range of circumstances:

- (a) about a person, with the person's consent; or
- (b) that is necessary for the exercise of a power or function under the WHS Act; or
- (c) that is made or given by the regulator or a person authorised by the regulator if the regulator reasonably believes the disclosure, access or use:

- (i) is necessary for administering, or monitoring or enforcing compliance with the WHS Act; or
 - (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations; or
 - (iii) is necessary for the administration or enforcement of another Act or law if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety; or
 - (iv) is necessary for the recognition of authorisations under a corresponding WHS law; or
 - (v) is required for the exercise of a power or function under a corresponding WHS law; or
- (d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
- (e) that is required or authorised under a law; or
- (f) to a Minister.

Circumstances (a), (b) and (c)(i) from the list above are considered to be most relevant to the day-to-day work of inspectors.

Regulators policy

s271(3)(a)

While s.271(3)(a) of the WHS Act enables an inspector to disclose information, give access to a document, or use information or a document that is about a person with the person's consent, this should only occur in the context of applying s.271(3)(b) of the WHS Act – that is the disclosure is necessary for the exercise of a power or function under the WHS Act (see below).

s271(3)(b)

Section 271(3)(b) of the WHS Act provides that inspectors are only to disclose, give access to, or use any information obtained or documents accessed during exercise of their powers and functions **to the extent necessary** in order to:

- make inquiries to elicit necessary and relevant information; or
- provide information and advice about compliance with the WHS Act; or
- articulate the basis of the inspector's reasonable belief that grounds exist to issue an improvement, prohibition, non-disturbance or an infringement notice; or
- prepare a brief of evidence at the conclusion of an investigation for the regulator's management/legal staff to consider; or
- explain context when arranging to have a seized thing analysed, tested or examined by another person; and
- any other functions/powers prescribed by regulation.

If, in exercising the above-mentioned powers or functions, disclosure/giving access/use of information and documents about a specific person are considered necessary, inspectors should first seek to obtain the relevant person's consent.

Regulators policy - s271(3)(c)

If it is necessary for the purposes of s.271(3)(c) of the WHS Act to disclose information, or the give access to a document, or use information in a document outside the reasons provided for in ss271(3)(a) & 271(3)(b), the regulator or their delegate may authorise the disclosure:

- if it is necessary for administering, or monitoring or enforcing compliance with the WHS Act; or
- is necessary for the administration or enforcement of another Act prescribed by the regulations; or
- is necessary for the administration or enforcement of another Act or law if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety; or
- is necessary for the recognition of authorisations under a corresponding WHS law; or
- is required for the exercise of a power or function under a corresponding WHS law; or
- that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
- that is required or authorised under a law; or
- to a Minister

The Regulator or their delegate will consider authorising any disclosure of information, or the giving of access to a document, or the use of information in a document outside the provisions of ss271(3)(a) & 271(3)(b) on a case-by-case basis.

Section 271 and HSR's

HSR's are bound by the requirements of s271.

Section 271 and the Inspection Report

An inspection report is a document that summarises the outcome of an inspection at a workplace, and advises the PCBU and any relevant HSR they have dealt with at the relevant workplace of an inspector's observations, actions, conclusions and any directions given as a result of the inspection.

Whilst there is no statutory requirement or entitlement for a HSR to receive it, the inspection report is voluntarily given to HSR's by inspectors. This is in line with the transparency provisions of the Compliance & Enforcement Policy. The HSR cannot divulge the content of an inspection report except as provided for by s.271(1) of the WHS Act.

The inspection report disclaimer further provides that a PCBU or HSR affected by an inspection can seek to view photographs and documents gathered during the relevant inspection. This disclosure is consistent with the disclosure allowed by s271(3)(a) of the WHS Act.

Sections 271(3)(d), (e) & (f)

In relation to s.271(3)(d), (e) and (f) of the WHS Act, an inspector may receive direct communication from, or otherwise be approached directly, by persons listed below seeking information or access to documents gathered by the inspector during exercise of their functions and powers.

- a Minister (or other politician), or
- a court or tribunal, or

- by any other person presenting a subpoena, or
- by any other person having lawful authority (such as the Ombudsman in their jurisdiction), or
- a person acting under Freedom of Information (or equivalent) laws.

Regulators policy

If an inspector is approached from a person outside of SafeWork SA to provide information or access to documents gathered by the inspector during exercise of their functions and powers, the inspector must direct the requestor to SafeWork SA's Freedom of Information process.

Further Reading

- *Freedom of Information Act 1991 (SA)*
- SA Public Sector Employee Code of Conduct
- International Association of Labour Inspectorate's Code of Integrity for Inspectors
- SA Government's Information Privacy Principles Instruction
(http://www.premcab.sa.gov.au/pdf/circulars/pc12_privacy.pdf)

Document Owner

Operational Support Team

Version control information

- V1 – 27 Nov 2012