

**Decision D0432000 – Published in note form only**

***Re Burswood Nominees Pty Ltd (trading as Burswood International Resort Casino) and WorkSafe Western Australia [2000] WAICmr 43***

**Date of Decision: 4 August 2000**

***Freedom of Information Act 1992 Schedule 1 clauses 5(1)(a), 5(1)(b), 5(1)(g), 8(1), 8(2), 11(1)(a) and 11(1)(b).***

On 7 March 2000, the complainant applied to WorkSafe Western Australia ('the agency') for access to documents which show the results of passive smoking tests conducted during February 1999 on a number of employees at the Burswood International Resort Casino. Only one document was identified as within the scope of the access application. That document ('the disputed document') is a copy of a report, dated 29 November 1999, prepared for the Australian Liquor, Hospitality and Miscellaneous Workers' Union ('the Union') by a team from the University of Western Australia's Department of Public Health, headed by Professor Musk. The agency refused access claiming that the disputed document is exempt under clauses 5(1)(a), (b) and (g); 8(1); 8(2); and 11(1)(a) and (b) of Schedule 1 to the FOI Act.

The applicant lodged a complaint with the Information Commissioner ('the Commissioner') seeking external review. Inquiries by the Commissioner determined that the document was supplied to the agency by the Union to assist members of the WorkSafe Western Australia Commission (a tripartite body consisting of representatives of employers and employees together with independent persons) when considering future legislative recommendations relating to smoking in the workplace. The document's findings had also been publicised by way of a media release from the Australian Council on Smoking and Health. Various media reports (some including comments by Professor Musk) and an editorial were subsequently published in *The West Australian* newspaper, although the specific results set out in the disputed document were not published.

After receiving further information from the agency, a preliminary view that the document may not be exempt pursuant to clauses 5(1)(a), 5(1)(b), 5(1)(g), 8(1), 8(2), 11(1)(a) and 11(1)(b) was given to both parties by the Commissioner, together with detailed reasons for that view. The agency made no specific submissions on the separate claims for exemption under clause 5(1) of Schedule 1 to the FOI Act, other than the general claim that the agency is an enforcement agency which relies on information provided, which would cease to be provided if organisations lose confidence in the agency's ability or willingness to keep such documents confidential. Clause 5 is concerned with effective law enforcement, including investigations or procedures in relation to a contravention or possible contravention of the law and other related issues. The Commissioner found that there was no information provided to show that there is or was any relevant investigation (as required by clause 5(1)(b)) or that the disclosure of the document could reasonably be expected to impair the effectiveness of investigative methods or procedures of an agency (5(1)(a)), or prejudice the maintenance or enforcement of lawful measures for protecting public safety (5(1)(g)). The document does not disclose any reference to a contravention or possible contravention of the law, but is a summary of the results from a study of the effect of environmental tobacco smoke on Casino workers. The Commissioner did not accept that disclosure of the disputed

document would jeopardise the provision of information by organisations such as the Union to assist the agency's efforts in achieving a safer, healthier workplace.

With regard to the remaining claims for exemption, exemption under clause 8(1) applies if disclosure would be a breach of confidence for which a legal remedy could be obtained, and that was not established by the agency. Nor did the agency establish the requirements of clause 8(2), because the Commissioner was not persuaded that the information in the document was confidential in nature (it having been given to a number of other bodies and reported in the media); or that it was reasonable to expect that individuals or organisations concerned about public health and safety would be reluctant in future to provide the agency with information similar to that in the present case.

The claims under clause 11(1)(a) and (b) were based on the argument that disclosure of the document would restrict the effectiveness of the agency's enforcement activities as a result of organisations being reluctant to provide such information in future. However, the smoking tests were not conducted by the agency and the Commissioner was not persuaded that the provision of information to the agency by the Union is a method or procedure for the conduct of tests, examinations or audits, or that disclosure of the document could reasonably be expected to impair the effectiveness of any such method or procedure or prevent their objects from being obtained.

Since the preliminary view of the Commissioner was that the disputed document may not be exempt under any of the clauses claimed, it was not necessary to consider the limit on the exemption to clauses 8(2), 11(1)(a) and 11(1)(b) which provides that matter is not exempt matter under those clauses if its disclosure would be, on balance, in the public interest. Nonetheless, the Commissioner expressed the view that there is a strong public interest in an organisation, the subject of a report given to a government agency, being provided with a copy of that report, especially in circumstances where the information contained in that document has apparently been provided to a number of bodies and has been the subject of comment in the press. The Commissioner expressed the opinion that there is a strong public interest in the document being disclosed so that the complainant can take appropriate action in light of the findings of that report.

After the provision of the Commissioner's preliminary view, no further submissions or information were received from either party to the complaint. As there was no new evidence presented requiring further deliberation, and having considered the material provided by the parties, the content of the disputed document and the reasons for the Commissioner's preliminary view, the Acting Commissioner adopted those reasons, set aside the decision of the agency and found that the document was not exempt.