



Western Australian Auditor General's Report

Opinion on Ministerial Notification: Ministerial decision to not provide information to Parliament in relation to the theatre production of *The Graduate*

Report 2 – March 2011





**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

**OPINION ON MINISTERIAL NOTIFICATION: MINISTERIAL DECISION TO NOT PROVIDE
INFORMATION TO PARLIAMENT IN RELATION TO THE THEATRE PRODUCTION OF *THE GRADUATE***

This report has been prepared for submission to Parliament under the provisions of section 24 of the *Auditor General Act 2006*.

COLIN MURPHY
AUDITOR GENERAL
23 March 2011

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Auditor General's Overview

Section 82 of the *Financial Management Act 2006* requires Ministers to give Parliament and the Auditor General written notice where they decide that it is reasonable and appropriate not to provide information requested by Parliament. Section 24 of the *Auditor General Act 2006* requires the Auditor General to form an opinion on the reasonableness and appropriateness of the Minister's decision and report this opinion to Parliament.

There have now been five instances from a total of 62 ministerial notifications since February 2007, where a Minister has informed me they have decided not to provide information to Parliament because it was commercial-in-confidence. In all of these instances, including this one, I have formed an opinion that the decision by the Minister was not reasonable and therefore was not appropriate. In each of these five instances, the agency's advice to their Minister in regard to the commercial confidentiality of the information was flawed and inadequate.

Ministers are entitled to rely upon, and must receive, the best quality advice and information that an agency can provide if they are to discharge their obligations to Parliament effectively. If the agency is unable to provide that standard of information to the Minister there is a risk that inaccurate or incorrect information will be provided to Parliament, and that decision-making on important matters will be less than optimal.

Sections 81 and 82 of the *Financial Management Act 2006* formalise a general principle in the public sector and government, that information should be disclosed unless there is good reason to withhold it. In my view, this principle particularly holds true where government expenditure is involved.

Agency advice to a Minister to withhold information from Parliament is an exception to this general principle. As such I expect agencies to have provided their Minister with a reasoned and well documented assessment to support such advice.

My previous opinions given under section 82 show a tendency for agencies to err in favour of claims of commercial-in-confidence information by private sector contractors. However, the onus rests with the party seeking to claim commercial-in-confidence to show why release of information would be prejudicial to it and should be prevented.

I have used the second section of this report to publish an updated version of my audit practice statement relating to section 82 notifications. This updated practice statement provides some further guidance to agencies on criteria that can be used to assess the commercial confidentiality of information.

Opinion on Ministerial Notification – Ministerial decision to not provide information to Parliament in relation to the theatre production of *The Graduate*

Opinion

Decisions by the Minister for Culture and the Arts on two occasions to not provide information to Parliament were not reasonable and therefore were not appropriate.

The Minister declined to:

- provide information on:
 - any dollar amount contributed by government to the production of *The Graduate*
 - projected audience attendances and other reasons presented by the promoters to justify the government's contribution
 - what previous commitments were cancelled or reviewed to fund the production of *The Graduate*
- table a contract relating to the production

Introduction

This report deals with decisions by Minister Day in his role as Minister for Culture and the Arts to not provide information to Parliament in relation to the production of *The Graduate*, a play performed at his Majesty's Theatre in August and September 2010.

Section 82 of the *Financial Management Act 2006* (the FM Act) provides that, if a Minister decides that it is reasonable and appropriate not to provide certain information to Parliament concerning the conduct or operations of an agency, then within 14 days of the decision the Minister is to cause written notice of the decision to be given to both Houses of Parliament and the Auditor General.

Section 24 of the *Auditor General Act 2006* (AG Act) requires the Auditor General to report to Parliament an opinion "as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operations of an agency is reasonable and appropriate".

What did we do?

Our approach included a review of publicly available information on the performing arts industry in Western Australia, relevant agency documents, interviews with key staff and advice from the State Solicitor's Office. Further details about our approach in arriving at these opinions are described in our Audit Practice Statement, shown at section 2 of this report and published on our website at <http://www.audit.wa.gov.au/howweaudit.php>.

Background

The Minister for Culture and the Arts was asked on 19 August 2010 to provide information to Parliament concerning the arrangements and funding of a production of the stage play called *The Graduate*. Specifically the Minister was asked how much funding the Perth Theatre Trust (PTT), or any agency within the Minister's portfolio, contributed to the production, the anticipated audience numbers presented to justify the state subsidy, any other reasons given to justify the subsidy and what previous sponsorship commitments to the arts were cancelled/reviewed in order to fund the commitment to production of *The Graduate*.

The Minister responded on 8 September 2010 that the details sought were commercial-in-confidence.

On 16 September 2010 the Minister was asked again whether any government subsidy was involved in the production, what business case and projected attendances were used to justify the subsidy and what other productions had been reviewed or shelved to enable this production to be supported. He was also asked to table the contract.

The Minister advised Parliament on 12 October 2010 that *The Graduate* was a 21 performance season at His Majesty's Theatre which has a maximum capacity of 1 200 seats per performance. It was presented in partnership with a private entity, Kay and McLean Productions Pty Ltd and all details of the contract were commercial-in-confidence.

He also said that maintaining confidentiality in such contracts was a key to achieving future partnerships with private enterprise. He did not confirm or deny the provision of a state subsidy for the production.

Declining to provide this information to Parliament triggered a further question on 16 November 2010 inquiring whether the Minister had complied with section 82 of the FM Act. The Minister advised Parliament on 25 November 2011 that he had notified the Auditor General as required.

The Minister stated in his letter to the Auditor General that

“to respond to this request would jeopardise the PTT's relationship and future commercial arrangements with private production companies”.

PTT is a statutory authority and a portfolio agency of the Department of Culture and the Arts. Its role is to administer performing arts venues such as the Perth Concert Hall and His Majesty's Theatre. It has contracted AEG Ogden (Perth) Pty Ltd (Ogden) as its venue manager. Ogden has authority to negotiate and enter contracts for productions as the agent for PTT, and an obligation to present all suitable offers for potential productions to the PTT Programming and Finance Committee and the Board of Trustees for consideration.

The contract in question is a presentation agreement between Ogden (as agent for the PTT) and Kay and McLean Productions Pty Ltd. Other parties involved in the production were HVK, Michael Coppel and Andrew Kay and Associates (AKA).

Ogden received an offer from AKA to present a play called *The Graduate* in Perth. Ogden presented this offer to the PTT's Programming and Finance Committee as a Venture Proposal on 23 February 2010. The Committee endorsed the proposal. An agreement was entered into between Ogden as agent for the PTT and Kay and McLean Productions Pty Ltd and executed as an agreement at 26 August 2010.

Key findings

1. The decisions not to table the information were not reasonable and therefore were not appropriate.

Except for the request to table the contract, all other information sought by Parliament was information contained in departmental briefing notes and memoranda, budgets and minutes of committees of the Board of Trustees.

A satisfactory response to the parliamentary questions could have been provided based on information contained in these documents without breaching any potential commercial-in-confidence obligations. The withholding of such information from Parliament particularly where it relates to any government financial support appears inconsistent with a culture of openness and accountability normally expected in a democratic system.

With regard to the request to table the contract, section 81 of the FM Act requires a Minister to ensure that an agency does not enter into a contract that will limit or prohibit the provision of information to Parliament. The contract contained the following confidentiality clause:

“Clause 12 – General Provisions

a) The terms of this agreement and all confidential information, material and technology disclosed or provided in any form by either party to the other in connection with the subject matter of this agreement, are confidential. Each party must ensure that all such confidential information is kept confidential. A party may reveal confidential information if required by law, if the confidential information is in or enters the public domain for reasons other than a breach of this agreement, or to its professional advisers to obtain professional advice”.

The State Solicitor's Office advised us that the clause does not operate to prevent the Minister from disclosing relevant information about the operations and financial management of the agency to Parliament if requested. However, they also advised that several clauses of the contract might be regarded as containing commercially sensitive information. In our view there is no reason why, with these clauses excised, the remainder of the contract could not be released.

2. The advice provided to the Minister by the Department of Culture and the Arts and the PTT was deficient and its preparation lacked rigorous analysis of the key issues in order to provide sound advice. We found that:
- the written advice to the Minister contained no analysis or reasoning to support the recommendations
 - undue weight was placed on the contractor’s opinion in the framing of the advice to the Minister
 - there was no application of commercial-in-confidence tests or criteria to decide if the requested information should be kept confidential
 - no legal or professional advice was sought in regard to the confidentiality of the information requested
 - no consideration was given to disclosing documentation with any commercial-in-confidence sections blanked out. This is an accepted practice to enable the disclosure of non-confidential information.

Departmental response

PTT is a commercial agency operating within the State Government and competes with other venue operators in attracting successful productions to its performing arts venues.

As part of its commercial activities, PTT enters into commercial arrangements with other parties that mean parts of the contract will contain confidential and sensitive information. In this instance, the information requested was considered commercially sensitive and this restricted the Minister’s capacity to provide that information to State Parliament.

PTT has reviewed its processes in relation to these types of questions and will ensure that it provides more detailed information to the Minister in the future.

Opinions on Ministerial Notifications

Introduction

Where a Minister decides not to provide certain information to Parliament concerning the conduct or operation of an agency (usually a decision taken in response to a parliamentary question), then certain requirements under the *Financial Management Act 2006* (FM Act) and the *Auditor General Act 2006* (AG Act) come into force.

Section 82 of the FM Act requires a Minister to give Parliament and the Auditor General written notice if deciding that it is reasonable and appropriate not to provide requested information to Parliament. The notice to Parliament should also contain a reason(s) for the decision.

Section 24 (2)(c) of the AG Act requires the Auditor General to form an opinion on the reasonableness and appropriateness of a Minister’s decision not to provide the information to Parliament. This opinion is to be reported to Parliament.

The Auditor General is not required to take any action under section 24(2)(c) of the AG Act until he/she receives a notice under section 82 of the FM Act.

When are section 82 notices not required?

A Minister is not required to provide a notice under section 82 of the FM Act where:

- the Minister has advised that information will be provided at a later date and there is reasonable justification for the delay
- an answer has been provided in a previous question
- the information is already publicly available
- the requested information does not concern any conduct or operation of the agency relevant to the FM Act
- the information is already being sought under the Freedom of Information Act
- the Minister refers a question to another Minister, with responsibility for the agency in question, for a response.

Where the Auditor General has received notices that fall into the above categories, the Auditor General may form the view that the notice provided pursuant to section 82 of the FM Act was unnecessary and no report to Parliament is required pursuant to section 24(2)(c) of the AG Act.

Methodology

All notices received under section 82 of the FM Act will be examined as to the Minister's reason for not providing the information to Parliament. The Auditor General will form an opinion on the reasonableness and appropriateness of a Minister's decision and report this to Parliament as required by section 24(2)(c) of the AG Act.

The steps in this process are:

1. Determine whether the notice was required by section 82 of the FM Act. If the notice is not required, then the Auditor General will inform the Minister.
2. If the notice was required, a review of the information in the notice, including the Minister's explanation for the decision, will occur.
3. If the Minister's reason for not providing information was that it requires diversion of resources or a similar reason, then the Minister's decision not to provide information will, in the opinion of the Auditor General, be deemed reasonable and therefore appropriate unless in all the circumstances it was manifestly unreasonable. This is based on Ministers having a duty to ensure that the resources of their agencies are used efficiently and effectively.
4. If the Minister's reason for not providing the information was it is commercially confidential or significant in nature, then a detailed review will occur. The detailed review aims to determine whether the Minister's decision is supported by appropriately documented assessment and advice against accepted criteria for commercially confidential or significant information. The review will include discussions with Ministerial and agency staff and examination of all relevant documents and advice provided to the Minister. Some guidance is provided below on accepted criteria for determining commercially confidential or significant information.
5. Based on this detailed review, an opinion will be provided that the Minister's decision is either:
 - reasonable and therefore appropriate, or
 - is not reasonable and therefore not appropriate.

Reporting

Where the Auditor General's opinion is that a Minister's decision to withhold information from Parliament was not reasonable and therefore was not appropriate, then that opinion will be tabled as a matter of urgency. All other opinions will be reported at the first suitable opportunity. These reports are tabled twice a year and contain the opinions on financial statements, controls and performance indicators of agency's with a 30 June or December 31 balance date.

Definition of commercially confidential

The legislation does not provide an interpretation of 'commercially confidential'. In the absence of such instruction to help form an opinion, we use commercial confidentiality criteria developed by the Australian National Audit Office from a 2007 guidance note produced by the federal Department of Finance and Deregulation. We also draw on a 2002 legal briefing published by the Australian Government Solicitor on identifying and protecting confidential information. It can be viewed at:

<http://www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/br64.htm>.

The criteria we use are:

1. The information to be protected must be specifically identified.
2. The information must be 'commercially sensitive'. This means that the information should not generally be known or ascertainable.
3. Disclosure would cause unreasonable detriment to the owner of the information or another party.
4. The information was provided under an understanding that it would remain confidential.

If criterion one is not met, the other criteria are not assessed. This approach supports a culture of openness and accountability for the expenditure of public money, efficient and effective management of government departments, and the most appropriate and beneficial use of public funds.

We also are mindful of the requirements of section 81 of the FM Act which states:

"The Minister and the accountable authority of an agency are to ensure that –

(a) no action is taken or omitted to be taken; and

(b) no contractual or other arrangement is entered into, by or on behalf of the Minister or agency that would prevent or inhibit the provision by the Minister to Parliament of information concerning any conduct or operation of the agency".

To comply with section 81 of the FM Act, agencies must ensure their contracts do not prevent information concerning an agency being disclosed to Parliament. This requirement is reflected in the confidentiality clauses in standard government contracts which allow confidential information to be disclosed if it is "required by any law, judicial or parliamentary body or governmental agency".

Definition of significant in nature

Information may be significant in nature if:

- the request contained in the notices raises potential significant issues of probity, performance, or waste, or any other audit-related risk and/or
- issues to be investigated are in line with the functions of the Auditor General under the AG Act.

Further information

For more information on how we go about conducting our audits, please refer to www.audit.wa.gov.au/howweaudit.php.