



Western Australian Auditor General's Report

Opinions on Ministerial Notifications

Report 16 – November 2013





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Opinions on Ministerial Notifications



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINIONS ON MINISTERIAL NOTIFICATIONS

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

A handwritten signature in black ink, appearing to read 'C. Murphy'.

COLIN MURPHY
AUDITOR GENERAL
13 November 2013

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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 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.

Sections 81 and 82 of the *Financial Management Act 2006* in addition to the *Freedom of Information Act 1992* formalise a general principle in the public sector and government, that information should be disclosed unless there is good reason to withhold it. Agency advice to a Minister to withhold information from Parliament is an exception to this general principle. Accordingly, such advice should be carefully considered and include documented assessment of factors such as public interest of disclosure and obligations of confidence.

This report details my opinions on individual notifications received from three Ministers on their decision not to provide information to Parliament. In only one of the instances was I able to form an opinion that the Minister's decision was reasonable and appropriate. In all three instances the agencies' advice to their Minister was not supported by thorough, documented assessment of relevant issues to support the recommendation not to provide requested information. This is disappointing given previous reports where I have highlighted the key principles and criteria that agencies should consider when providing such advice.

One of the instances above related to legal professional privilege preventing release of information to Parliament. A matter for noting is that Ministers in responding to requests for information do not have authority to expressly waive privilege in legal advice provided to executive government. Only the Attorney General or his delegate may make a decision to waive privilege.

Ministerial decisions not to provide information to Parliament

Introduction

This report deals with three separate Ministerial decisions not to provide information to Parliament:

- Minister Jacob in his role as Minister for Environment relating to information on legal advice sought in relation to the Margaret River bushfires in 2011
- Minister Redman in his role as Minister for Forestry relating to information on contracts of sale with the Forest Products Commission
- Minister Day in his role as Minister for Planning relating to information on outcomes of a tender for a public relations services contract for Whiteman Park.

Section 82 of the *Financial Management Act 2006* provides that, if a Minister decides that it is reasonable and appropriate not to provide certain information to Parliament concerning the conduct 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* 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 operation of an agency is reasonable and appropriate'.

What Did We Do?

Our approach in arriving at these opinions is outlined in our 'Audit Practice Statement' and is published on our website at <http://www.audit.gov.au>. It included a review of agency documentation, and discussions with and written comments from agency staff. We also had discussions with, and sought advice from, the State Solicitor's Office and the Information Commissioner's Office.

Ministerial decision not to provide information to Parliament about legal advice sought in relation to the Margaret River bushfires in 2011

Opinion

A decision by the Minister for Environment not to provide information to Parliament was reasonable and appropriate.

The Minister declined to provide information on the number of times legal advice was sought about the November 2011 Margaret River bushfires, and the cost of that advice.

Background

The Minister for Environment was asked a question in the Legislative Assembly on 17 April 2013 about the Margaret River bushfires. The question was:

- “On how many occasions the Department sought legal advice from the State Solicitor on issues arising from those fires
- the dates on which advice was sought and obtained
- on how many occasions the Department sought other legal advice on issues arising from those fires, and in particular:
 - who provided the legal advice
 - the dates on which the advice was sought and obtained
- the approximate total cost of legal advice given.”

On 14 May 2013, the Minister responded as follows:

“The Department of Environment and Conservation seeks legal advice from the State Solicitor’s Office and the Department’s own Legal Services Branch as required. Legal professional privilege attaches to communications for legal advice made by, and legal advice provided to, the Department.”

The Minister notified the Auditor General on 17 July 2013 that he was unable to provide an answer to the question asked because legal professional privilege attaches to requests for legal advice made by, and legal advice provided to, the Department. Further, the Minister advised that to provide and publicly reveal information regarding requests for legal advice made by, and legal advice provided to, the Department risks waiving legal professional privilege.

Key Findings

The decision by the Minister not to provide the requested information was reasonable and appropriate.

However, we also found that while the Minister’s decision was properly founded on the

advice from the Department, the basis of the advice was not supported by documented reasoning and assessments.

The Minister correctly sought advice from the Department before responding to the information request. The Department's advice to the Minister was that legal professional privilege attaches to requests for legal advice made by, and provided to, the Department and implied that the information should therefore not be disclosed. The Department's Legal Services Branch agreed to the advice before it was given to the Minister. However, no documented analysis was done to support the advice.

In reviewing the Minister's decision, we were told by the Department that it had also sought advice from the State Solicitor's Office (SSO) on how the Minister should respond to the information request, and that their advice was consistent with the Department's recommendation to the Minister.

The Department advised that its request to the SSO for advice was made, and given, over the telephone. A legal officer from the SSO recalled that he had received a call from the Department around the time that the Department said that it sought advice. However, neither the Department nor the SSO kept any record of the request itself or the advice provided. As a result, we were unable to establish the specifics of the request, or the advice that was given.

As part of our investigation we sought advice from the SSO on whether it agreed with the advice given by the Department to the Minister.

The SSO's advice led us to the view that a cautious approach should be taken to the possible waiver of legal professional privilege. However, while it is unlikely that the mere disclosure of dates and the cost of the advice would impliedly waive legal professional privilege, there may be factual circumstances that would lead to a conclusion that disclosure of the information was inconsistent with the maintenance of confidentiality of the legal advice.

For example, if a particular event occurred, and advice was immediately sought after that event, advice was given, and the government then adopted a particular course of action, an inference might be drawn as to the nature and content of the advice sought and given, raising an implied waiver question.

The SSO's advice to us also raised a matter that has broader application than just this issue. That is, we note that Ministers do not have authority to expressly waive privilege in legal advice provided to executive government. Only the Attorney General or his delegate (ostensibly the SSO) may make a decision to waive privilege.

Ministerial decision not to provide information to Parliament in relation to contracts of sale with the Forest Products Commission

Opinion

A decision by the Minister for Forestry not to provide information to Parliament was not reasonable and was therefore not appropriate.

The Minister declined to provide information on the following contracts of sale:

- Auswest Timbers Pty Ltd, contract numbers 2773, 2770 (A) and any others relating to Auswest Timbers
- Blueleaf Corporation Pty Ltd, contracts numbers 2765, 2771 and any others relating to Blueleaf Corporation
- Nannup Timber Processing Pty Ltd, contract number 2772 and any others relating to Nannup Timber Processing.

Background

The Minister for Forestry was asked a question in the Legislative Council on 14 August 2013. The question was:

- “1) Will the Minister please table the following contracts of sale:
- a) Auswest Timbers Pty Ltd, contract numbers 2773, 2770 (A) and any others relating to Auswest Timbers;
 - b) Blueleaf Corporation Pty Ltd, contracts numbers 2765, 2771 and any others relating to Blueleaf Corporation; and
 - c) Nannup Timber Processing Pty Ltd, contract number 2772 and any others relating to Nannup Timber Processing?
- 2) If no to (1), why not?”

The Minister notified the Auditor General on 13 September 2013 that “I decline to provide an answer because the information requested is commercially sensitive.”

On 17 September 2013 the Minister responded in Parliament that he would not table the contracts as they “... contain commercially sensitive information.”

Key Findings

The decision by the Minister for Forestry not to provide the requested information was not reasonable and therefore was not appropriate. This opinion is based on consideration of the following facts and circumstances.

The information sought was the Production Contracts for the sale of hardwood timber, which included a standard Contract of Sale of Log Timber, schedule of prices and details of production and cartage rates.

In reviewing the Minister's decision, we assessed whether any obligation of confidence exists between FPC and the companies that were the subject of the information request. Further, we assessed whether the Minister was provided with any written advice to support FPC's recommendation that the contracts contained commercially sensitive information.

We found that an obligation of confidence does exist but not to the extent that it should prevent at least partial disclosure of the contract.

Clause 27 of FPC's contracts requires the prior consent of the company in order to reveal to any third party (other than to the Minister) any company statistics referred to in clause 13 or any data or technical information provided by the company to FPC under the agreement.

However, the agreement does provide for partial disclosure and allows full disclosure in some circumstances:

1. Some information could be disclosed for the purpose of publishing on the Western Australian Government Contracting Information Bulletin Board:
 - a) a general description of the goods and/or services the subject of this agreement
 - b) the buyers name
 - c) the total agreement price or value.
2. Full disclosure is allowed where required under the *Freedom of Information Act 1992* or by law, or by tabling in State Parliament, or under a Court order. In the event of disclosure in this circumstance, the company could not have, make or bring any action against FPC or the State for any loss, injury, damage, liability, cost or expense resulting from the disclosure of Contract Award Information.

FPC's advice and recommendation to the Minister on how to respond to the information requested read in part:

- Each of the above customers has a term in their contract of sale wherein the FPC undertakes not to reveal to any third party (the Minister being excepted) any information relating, to, among other things, log intake, delivery schedules, monies payable under the contract etc. In addition, FPC has a general duty to preserve commercially sensitive information.
- The Minister is not a party to any of the contracts, and in the event he elects to table the documents, the contract terms prevent the contractor from bringing a claim against the FPC or the Minister for such a disclosure. However, there is no requirement at law for these deeds to be tabled.

- In the event an application is made for a copy of the deeds under the *Freedom of Information Act 1992*, FPC may be able to provide copies with commercially sensitive information redacted.
- The contracts contain commercially sensitive information.

In our view, the advice from FPC to the Minister was deficient in that it:

- failed to accurately reflect the contents of the non-disclosure clause in the contracts of sale. Specifically, that documents and other information related to the contracts can be made available to Parliament, and that some contract award information is made publicly available on Tenders WA
- incorrectly advised there is no requirement at law for the requested information to be tabled. This advice did not reflect the requirements of section 81 of the *Financial Management Act 2006*
- gave no reason for why the contracts of sale could not be tabled with commercially sensitive information redacted. The advice only referred to providing copies of the contracts with commercially sensitive information redacted if an application was made under the *Freedom of Information Act 1992*
- did not identify what contract information was considered commercially sensitive.

Had the Minister accepted a recommendation by FPC to table the contracts with commercially sensitive information redacted, then our investigation would have required us to further assess:

- the tests and reasoning used to determine what is commercially sensitive information
- the logic used to conclude that commercial disadvantage outweighed the public interest.

Response from Forest Products Commission

The request to table the three contracts of sale occurred on 14 August 2013. This occurred four weeks after the release of an early tender advice by FPC for the sale of native forest products under the next Forest Management Plan 2014-23. This sale process is valued at over \$250 million dollars over the period of the FMP with the new contracts scheduled to commence from 1 January 2014. The FPC considered that the release of the requested information through tabling in Parliament may have been in contravention to the probity and confidentiality requirements associated with such a high value and sensitive tender process. It may have also placed the customers concerned in a disadvantageous position in this process.

Similarly, following the announcement that the Whitakers saw mill in Greenbushes would be closing during 2013, the FPC has been in extensive negotiations with Blueleaf Corporation Pty Ltd (the parent company) since June this year, facilitating the termination of their contract and the sale and assignment of their log volumes to other customers. This process is still underway, the existing contract has not yet been terminated, nor have any volumes of timber under this contract been sold and allocated to new customers. The tabling of contractual information for this customer may have impacted adversely on this process.

Ministerial decision not to provide information to Parliament in relation to outcomes of a tender for a public relations services contract

Opinion

A decision by the Minister for Planning not to provide information to Parliament was not reasonable and was therefore not appropriate.

The Minister declined to provide information on the hourly rate of the awarded contract and the names of all individuals and companies who submitted quotes for the tender and the quotes associated with each of those submissions.

Background

The Minister for Planning was asked a question in the Legislative Assembly on 6 August 2013 as follows:

“I refer to the awarding of Planning Commission contract DP102013 to Professional Public Relations for public relations services for Whiteman Park Management, and I ask:

- (a) what was the final total value of the awarded contract;
- (b) what is the hourly rate of the awarded contract;
- (c) how long is the contract for;
- (d) what are the names of all individuals or companies who submitted quotes for the tender;
- (e) what was the tender quote associated with each of these submissions; and
- (f) why were the five communications officers employed at the Department of Planning unable to provide these PR and media services?”

The Minister responded as follows:

- “(a) The details of all tenders can be found at <http://www.tenders.wa.gov.au>
- (b) I am unable to provide this information, as it is considered to be commercially sensitive.
- (c) The contract is for one year and there are two one-year extension options.
- (d - e) I am unable to provide this information, as it is considered to be commercially sensitive.
- (f) As a prominent tourist attraction for the Perth metropolitan region which attracts more than one million visitors per annum, Whiteman Park has very specific specialist media and public relations requirements.

The Department of Planning's Communications Branch focuses on the day to day communication requirements of the Department, including production of publications (electronic and hard copy), proactive media and responding to media issues related to planning matters."

The Minister notified the Auditor General on 17 September 2013 that he was unable to provide answers requested to parts (b) and (d-e) due to the commercially sensitive nature of the information.

Key Findings

The decision not to provide information on:

- the hourly rate of the awarded contract
- the names of all individuals or companies who submitted quotes for the tender
- the tender quote associated with each submission

was not reasonable and therefore not appropriate. This opinion is based on consideration of the following facts and circumstances.

The Department of Planning drafted an initial response to the Parliamentary Question (PQ) that provided all of the requested information. However they then sought further advice from the Department of Finance who managed the procurement process on their behalf. The advice was that information in response to parts (b), (d) and (e) of the PQ would not normally be provided to external parties.

The reasoning was that details of the successful contract and the award price are published on the Tenders WA website and that unsuccessful respondents can seek a debrief meeting with the Department of Finance. The advice also suggested that even if the information request was made under the *Freedom of Information Act 1992* (FOI) it would not normally be provided.

However the Department of Finance also recommended that the Department of Planning should confirm this with their FOI officer. The Department of Planning did not seek this further advice and instead relied solely upon the Department of Finance advice in the recommendation to the Minister. The Department's recommendation to the Minister stated only that the information being sought was commercially sensitive. In our view the recommendation to the Minister was not formed with sufficient rigour. In forming their advice neither Department applied reasonable tests to determine whether there was an obligation of confidence over the information requested and whether the public interest of disclosure outweighed confidentiality considerations.

In particular, we note the Department of Finance's "*Request Conditions and General Conditions of Contract – August 2012*" makes clear that Offer information may be

made publicly available if requested by Parliament unless the respondent expressly and reasonably nominates specific information in the Offer that it wishes to remain confidential. This same requirement is described within the Department of Finance's tender submission templates that are completed by tenderers.

The successful respondent was the only tenderer to nominate information as confidential. They requested that their Offer information be treated as confidential. However, because they were the successful tenderer, this information was automatically published on the tenders WA website. The Minister provided this information in answer to Part (a) of the PQ.

Given that none of the unsuccessful respondents nominated specific information as confidential, no clear obligation of confidence exists to prevent the Minister from providing the information. Further it is difficult to envisage how the respondents could suffer any significant commercial disadvantage from the disclosure of the requested information.

As part of our investigation we sought advice from the Information Commissioner. Their advice was that if the information had been requested through FOI it may not have been exempt. Any potential commercial disadvantage from disclosure may be subject to a public interest test. This requires consideration of factors such as the public's interest in open and accountable government and the higher degree of scrutiny to be expected by organisations doing business with government.

Response from Department of Planning

In preparing advice for the Minister for Planning, the Department of Planning sought advice from the Department of Finance and this advice was followed.

The Department of Planning formed the view that the Department of Finance's advice would be consistent with State Supply Commission's policy framework.

Given the partial exemption which is provided to the Department of Planning by the Department of Finance only applies to tenders under \$20 000 and this tender was in excess of \$20 000 (and therefore managed by the Department of Finance) it is reasonable that the advice of the Department of Finance should be strictly adhered to. Any erosion of confidence in the Department of Finance's processes by the Department of Planning or its Minister could expose the Department of Planning and its Minister to criticism.

The Department of Planning is of the view that no other course of action should have been taken given the advice received when preparing a response to the Parliamentary Question. However, it welcomes a recommendation of the Auditor General and suggests that this matter be clarified for all government agencies that operate under the Department of Finance's procurement processes so a consistent approach is adopted in future.

Response from Department of Finance

The advice provided by the Department of Finance was in accordance with long standing procurement practice in relation to unsuccessful tenderers. The Department acknowledges that it was open for the details requested to be provided in accordance with the *“Request Conditions and General Conditions of Contract – August 2012”*. Departmental officers from either Finance or Planning could have suggested a personal briefing or written response, which would potentially overcome the issue of public disclosure.

Auditor General's Reports

REPORT NUMBER	2013 REPORTS	DATE TABLED
15	Audit Results Report – Annual 2012-13 Assurance Audits	13 November 2013
14	Public Trustee: Administration of the Financial Affairs of Vulnerable People	18 September 2013
13	Sustainable Funding and Contracting with the Not-For-Profit Sector – Component I	18 September 2013
12	The Banksia Hill Detention Centre Redevelopment Project	7 August 2013
11	Information Systems Audit Report	27 June 2013
10	Supply and Sale of Western Australia's Native Forest Products	26 June 2013
9	Administration of the Patient Assisted Travel Scheme	26 June 2013
8	Follow-up Performance Audit of Behind the Evidence: Forensic Services	19 June 2013
7	Fraud Prevention and Detection in the Public Sector	19 June 2013
6	Records Management in the Public Sector	19 June 2013
5	Delivering Western Australia's Ambulance Services	12 June 2013
4	Audit Results Report – Annual Assurance Audits: Universities and state training providers and Other audits completed since 29 October 2012 – and Across Government Benchmarking Audits: Recording, custody and disposal of portable and attractive assets and Control of funds held for specific purposes	15 May 2013
3	Management of Injured Workers in the Public Sector	8 May 2013
2	Follow-on Performance Audit to 'Room to Move: Improving the Cost Efficiency of Government Office Space'	17 April 2013
1	Management of the Rail Freight Network Lease: Twelve Years Down the Track	3 January 2013

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