

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 12: June 2015

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

Opinions on Ministerial Notifications

Report 12
June 2015



**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 and 25 of the *Auditor General Act 2006*. It details my opinions on the reasonableness and appropriateness of decisions by three Ministers not to provide information to Parliament.

These related to:

- the Minister for Transport, the Hon Dean Nalder, on an updated schedule of major transport infrastructure works for Western Australia
- the Minister for Tourism, the Hon Kim Hames, on the value of incentives provided on the sale of FESA House
- two decisions made by the Minister for Planning, the Hon John Day, one on the valuation for the East Perth Power Station and another about unsolicited proposals to buy the site.

The report should provide value to all agencies because it identifies shortcomings in agency assessments that influenced their advice to their Minister. In particular, it demonstrates a need to establish whether the requested information is already publicly available.

I wish to acknowledge the staff at the Metropolitan Redevelopment Authority, the WA Tourism Commission and the Department of Transport for their cooperation with this report.

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

COLIN MURPHY
AUDITOR GENERAL
25 June 2015

Contents

- Ministerial decisions not to provide information to Parliament 4
 - Introduction 4
 - What Did We Do? 4
- Ministerial decision to refuse to provide an updated program of works for major transport projects..... 5
 - Opinion..... 5
 - Background..... 5
 - Key Findings 5
 - Agency Response..... 7
- Ministerial decision to refuse to provide information on the sale of public land..... 8
 - Opinion..... 8
 - Background..... 8
 - Key Findings 9
 - Agency Response..... 9
- Ministerial decisions to refuse to provide information about East Perth Power Station 10
 - Opinions 10
 - Background..... 10
 - Key Findings 11
 - Agency Response..... 12

Ministerial decisions not to provide information to Parliament

Introduction

This report deals with decisions by three Ministers not to provide information to Parliament. Those decisions were made by:

- Minister for Transport, the Hon Dean Nalder, on an updated schedule of major transport infrastructure works for Western Australia
- Minister for Planning, the Hon John Day, on the valuation for the East Perth Power Station
- Minister for Tourism, the Hon Kim Hames, on the value of incentives provided on the sale of FESA House.

Section 82 of the *Financial Management Act 2006* (FM Act) applies if a Minister decides that it is reasonable and appropriate not to provide certain information to Parliament concerning the conduct of an agency. The Act says the Minister must give written notice of the decision to both Houses of Parliament and the Auditor General within 14 days of the decision.

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 to not provide the information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate'.

What Did We Do?

The *Audit Practice Statement* on our website (www.audit.wa.gov.au) sets out the process we follow to arrive at our section 82 opinions, including:

- a review of agency documents
- communication and interviews with key staff
- a review of any advice provided to the relevant Minister by agencies, the State Solicitors Office (SSO) or other legal advisers.

Ministerial decision to refuse to provide an updated program of works for major transport projects

Opinion

The decision by the Minister for Transport not to provide information to the Legislative Council was not reasonable and therefore not appropriate.

The information sought was a briefing note on future Commonwealth funding arrangements for major transport infrastructure projects.

Background

In Parliament on 23 September 2014, the Hon Ken Travers MLC asked the Minister for Transport for information on the program of works to be co-funded by the Commonwealth. Legislative Council Question on Notice 1684 was:

(1) Will the Minister please table the briefing note entitled 30-38576 – Update Program of Works for Western Australia?

(2) If no to (1), why not?

This briefing note contained the following information:

1. Agency advice to the Minister dated 14 June 2013 about a letter from the Federal Minister on federal funding of major transport infrastructure projects under a new National Partnership Agreement (NPA).
2. The letter from the Federal Minister dated 24 May 2013.
3. A schedule of projects attached to the letter (the draft Schedule). The draft Schedule set out the amounts that the Federal Government had paid out on the projects to then, as well as future amounts it was prepared to pay under the new NPA.
4. A draft response to the Federal Minister.

On 19 November 2014, the Minister declined to provide any of the requested information to Parliament, replying:

(1) No

(2) This document contains commercially sensitive information. Additionally the release could prematurely disclose information that would affect future tender options.'

On 7 January 2015 the Minister notified the Auditor General of his decision not to provide the requested information in accordance with section 82 of the FM Act.

Key Findings

The decision by the Minister not to provide the requested information was not reasonable and therefore not appropriate as most of the information was publicly available at the time of the Minister's decision.

The Minister properly sought advice from the Department of Transport (Transport) before responding to Parliament's request. Transport recommended that the information not be provided to Parliament.

Neither the briefing note itself, nor Transport's advice to the Minister or the letter from the Federal Minister contained any commercially sensitive information or information which if released would appear likely to cause harm to Commonwealth-State relations. However, Transport did not specifically advise the Minister as to whether these documents could be provided in response to the Parliamentary Question. Transport also did not assess and specifically advise the Minister on whether to release the draft response to the Federal Minister. But, in our view, it would not be appropriate to release a draft letter.

Transport's focus and concern was on the draft Schedule. Its view was that the information requested was commercially sensitive and that disclosure could damage Commonwealth-State Government relations. It also advised that releasing the information could affect future tender options.

Transport's view was that the information would be exempt if sought under the *Freedom of Information Act 1992* (FOI Act). The Act exempts an agency from releasing information that may:

- reveal information of a confidential nature communicated to another government
- result in detriment to an agency or the government if it prematurely discloses proposed actions of an agency or the government, or
- reveal information that has commercial value to an agency and that value would be destroyed or diminished by such disclosure.

This exemption is not automatic and would have to be weighed against any public interest in disclosing the information. We found no evidence that Transport had considered whether it would be in the public interest for the information to be disclosed.

Transport also did not seek the views of the Department of Infrastructure and Regional Development (DIRD) which is the Commonwealth department responsible for providing the funding. Had it done so, it would likely have discovered that DIRD was intending to publish the NPA and the final Schedule on its website in accordance with its normal procedures. In our view most of the information in the draft Schedule was also in the final Schedule.

Transport had therefore not considered the effect of these disclosures when it gave its advice to the Minister. By the time the Minister gave his answer in Parliament, DIRD had uploaded the final Schedule onto its website.

The timeline below summarises the relevant events:

23 September 2014	Parliamentary Question asked about projects to be covered by new NPA
10 October 2014	WA signs new NPA
15 October 2014	Transport provides advice to Minister not to disclose information
16 October 2014	Minister's Office reviews the advice
17 October 2014	DIRD uploads the final Schedule of WA projects and how they will be funded by the Federal Government under the new NPA
7 November 2014	DIRD uploads the signed copy of the new NPA together with the final Schedule
19 November 2014	Minister answered the Question.

We recommend Transport consider changing its processes to address the weaknesses highlighted in this Opinion. Specifically:

- releasing those parts of any requested information that are not confidential or sensitive
- consider whether disclosing the information in the public interest outweighs the reasons for withholding it
- seek advice from other parties where this is warranted, including legal advice if unsure about whether information is commercially sensitive.

Agency Response

DoT accepts that the delay between the initial advice and the time the Minister gave the answer to Parliament meant that all the information relevant to his decision was not before him and DoT is taking steps to avoid such a situation occurring in the future.

Ministerial decision to refuse to provide information on the sale of public land

Opinion

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

The Minister declined to provide the total value of incentives associated with the sale of FESA House (the Sale). He also declined to provide a breakdown by component.

Background

Before the Minister was asked to provide the information, a Member of Parliament asked for Sale information from a number of agencies, including the Western Australian Tourism Commission (Tourism WA) and the Western Australian Land Authority (LandCorp).

On 22 October 2014, Ms Margaret Quirk MLA asked the Minister for Tourism the following question in Parliament.

- (1) Can the Minister for Tourism advise the total value of incentives given to BGC and the Starwood hotel group for the construction of a hotel on the old Fire and Emergency Service Authority house site?
- (2) What are the components and amounts of concessions making up that total?

On 27 November 2014, the then Acting Minister for Tourism, the Hon John Day, replied:

- (1) Confidentiality of negotiations is critical in order to maintain the Government's ability to negotiate the best outcome on future land transactions. Accordingly, I will be notifying the Auditor General's office and both Houses of Parliament that I will not be answering this question, as per section 82 of the *Financial Management Act 2006*.
- (2) The Government incentives policy to encourage the development of hotels is detailed on the Tourism Western Australia corporate website, in the section entitled 'Facilitating Infrastructure Growth'. The incentives, which are assessed on a project-by-project basis, are:
 - (i) Land – a number of development sites throughout the city have been designated for hotel development. In some cases, favourable conditions and terms have been provided for land.
 - (ii) Plot Ratio Bonus – the City of Perth introduced plot ratio, or floor space, bonuses in 2013. Plot ratio bonuses of various levels can be applied to the construction of a hotel within the designated area of the Perth CBD.'

On 26 November 2014 the Acting Minister notified the Auditor General of his decision not to provide the requested information, in accordance with the FM Act.

Key Findings

We found the decision by the Minister not to provide the requested information to Parliament was not reasonable and therefore not appropriate as the information was publicly available at the time of the Minister's decision.

The Minister properly sought advice from Tourism WA before responding to Parliament's request. Tourism WA recommended not providing the information to Parliament.

Tourism WA used suitable criteria to assess whether the information requested was commercial-in-confidence. However, in our view their assessment against one of the criterion was flawed. This criterion is the requirement that commercially confidential information should not generally be known or ascertainable.

Tourism WA obtained various independent valuations for the FESA House site. The value of the hotel incentive was the difference between the average valuations at highest and best use and the agreed sale price.

Tourism WA's advice to the Minister was that revealing the incentive would impact on the Government's capacity to negotiate the best outcome on future sales. However, Tourism WA did not establish whether the valuations and selling price were already in the public domain.

We found that this information had been disclosed in another agency's financial statements, in budget estimates hearings and, by agencies other than Tourism WA, to Ms Quirk under the FOI Act. This meant the information was no longer confidential as defined by the criterion.

As this criterion was not met we did not further assess the other commercial-in-confidence criteria.

Agency Response

Tourism WA acknowledges that additional research is needed to determine if other agencies have disclosed information as part of its assessment of commercially confidential information. The agency's processes have been adjusted accordingly.

Ministerial decisions to refuse to provide information about East Perth Power Station

Opinions

1. The decision by the Minister for Planning not to provide Parliament with detailed information about unsolicited approaches to buy the East Perth Power Station site (the Site) was reasonable and appropriate. The Minister declined to provide the names of the interested buyers, the date of the first contact, and the names of those present at meetings held to discuss the approaches.
2. The decision by the Minister for Planning not to provide the current valuation of the Site was not reasonable and therefore not appropriate.

Background

On 15 October 2014 the Hon Amber-Jade Sanderson MLC asked the Parliamentary Secretary representing the Minister for Planning (the Minister) the following question on notice:

'I refer to the Premier's media statement of 25 September 2014, and the plan to sell the East Perth Power Station site, and ask:

- (a) since 2008, has the Government been approached by a potential buyer, or buyers, to register their interest or propose to purchase the site;
- (b) if yes to (a), who are the interested buyers;
- (c) if yes to (a), when was the first, or initial contact made to the Government;
- (d) if yes to (a), has the Government met with any interested buyers, and if so, who was present at those meetings;
- (e) when was the last time the site has been valued;
- (f) what is the current valuation; and
- (g) when did the Government decide it would sell the site?'

On 26 November 2014, the Parliamentary Secretary to the Minister responded to this request by declining to provide answers to (b)-(d) and (f), replying:

- (a) Yes
- (b)-(d) Since 2008 the East Perth Power Station has attracted unsolicited interest from the private sector. This interest is expressed in a commercially sensitive environment.
- (e) July 2013
- (f) This information is commercial-in-confidence, in the interests of achieving the best return for the State.
- (g) Premier Barnett announced on 25 September 2014 that the East Perth Power Station would be offered for sale by the State Government among a suite of 20 key land assets.

In accordance with section 82 of the *Financial Management Act 2006* notification will be provided to the Auditor General.'

The Minister notified the Auditor General on 4 December 2014 of his decision not to provide the requested information in accordance with section 82 of the FM Act

Key Findings

Unsolicited proposals

We found the decision by the Minister not to provide information about the unsolicited proposals to buy the Site was reasonable and appropriate.

The Minister properly sought advice from the Metropolitan Redevelopment Authority (MRA) and legal advice from the State Solicitor's Office before responding to Parliament's request. The Minister's response was consistent with the advice.

The MRA based its advice not to disclose this information on its view that potential buyers would have had a reasonable expectation the approaches would be treated confidentially.

The MRA's custom and practice is to treat these approaches as confidential. This is to give potential buyers the confidence of knowing that their business intentions will not be revealed to third parties until the potential buyer is more certain they want to proceed. It believes that if it did not adopt this position, potential buyers might cease to approach them, to the detriment of the State.

The MRA also said there was transparency built into the process. This is because the eventual selection of a buyer is still subject to a rigorous process that starts with a public request for formal Expressions of Interest.

In our view, the MRA's position seems reasonable.

We accept that potential buyers may want to discuss opportunities and issues before they formalise their interest and that they would expect these discussions to be confidential. In turn we would expect that the agency has a policy or formal process for handling unsolicited proposals/enquiries, including making a comprehensive record of any discussions held with a potential buyer that comply with the requirements of the *State Records Act 2000*.

We noted that the MRA did not have a policy or process, despite saying they often receive such proposals/enquiries. A South Australian Auditor General's report tabled on 10 February 2015¹ highlights the risks associated with handling such approaches in an informal manner. The report also sets out some elements of good practice.

We have recommended to the MRA that it establish a policy for dealing with unsolicited approaches. We also recommended that the MRA establish policy and criteria for dealing with requests for information that may be commercial-in-confidence.

¹ Audit of the Gillman site transactions: key shortcomings in assessing an unsolicited proposal: December 2014 report: supplementary report tabled 10 February 2015.

Current valuation

We found the decision by the Minister not to provide information about the current valuation of the Site was not reasonable and therefore not appropriate.

The Western Australian Land Information Authority determines current valuations for land and makes these available to the public for a small fee. This information is readily available and therefore not confidential.

The MRA advised that they interpreted the question to the Minister to be about private valuations obtained from third parties. We acknowledge such a valuation can often be considered commercially sensitive. However, there was no indication that private valuations were requested in the Parliamentary Question.

Agency Response

The Metropolitan Redevelopment Authority acknowledges the work of the Office of the Auditor General in undertaking an examination of the Minister for Planning's decision not to provide information about unsolicited approaches to buy the East Perth Power Station. The Metropolitan Redevelopment Authority is working to improve its processes for dealing with unsolicited approaches and to more robustly consider requests for information that may be commercial-in-confidence.

It is usual for the Metropolitan Redevelopment Authority to gather market valuations as part of its strategic decision making process whereby it gathers input from various commercial experts to inform its strategy for the release of assets to the market. This is usual commercial practice and to ensure that the best result is obtained for the taxpayers of Western Australia. The Metropolitan Redevelopment Authority needs to be able to undertake its work with commercial in confidence.

Auditor General's Reports

Report Number	Reports	Date Tabled
11	Regulation of Training Organisations	24 June 2015?
10	Management of Adults on Bail	10 June 2015
9	Opinions on Ministerial Notifications	4 June 2015
8	Delivering Essential Services to Remote Aboriginal Communities	6 May 2015
7	Audit Results Report — Annual 2014 Financial Audits	6 May 2015
6	Managing and Monitoring Motor Vehicle Usage	29 April 2015
5	Official Public Sector Air Travel	29 April 2015
4	SIHI: District Medical Workforce Investment Program	23 April 2015
3	Asbestos Management in Public Sector Agencies	22 April 2015
2	Main Roads Projects to Address Traffic Congestion	25 March 2015
1	Regulation of Real Estate and Settlement Agents	18 February 2015

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