

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 19: August 2015

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Opinions on Ministerial Notifications

Report 19
August 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 provides my opinion on the reasonableness and appropriateness of three decisions not to provide information to Parliament.

The Minister for Sport and Recreation made these decisions not to provide information to Parliament about the arrangements to design, build, finance and maintain the new Perth Stadium. The Minister refused to provide Parliament with some information from the State's agreement with the Westadium consortium and refused to provide an unredacted copy of the contract.

I have been unable to obtain sufficient appropriate evidence on the Minister's decisions not to provide information to Parliament. Accordingly, I am unable to form an opinion whether those decisions were reasonable and appropriate.

This report outlines the circumstances through which I arrived at this conclusion and highlights deficiencies with the *Auditor General Act 2006* in relation to access constraints to documents protected by Cabinet-in-confidence or legal professional privilege.

I wish to acknowledge the staff at the Department for Sport and Recreation, the Department of Treasury and the State Solicitors Office for their time and contribution to this report.

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

COLIN MURPHY
AUDITOR GENERAL
27 August 2015

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Ministerial decisions to refuse to provide information to Parliament about the new Perth Stadium

Introduction

This report deals with three decisions by the Minister for Sport and Recreation, not to provide information to Parliament about the arrangements to design, build, finance and maintain the new Perth Stadium. The Minister refused to provide some information from the State's agreement with the Westadium consortium and refused to provide an unredacted copy of the contract.

Section 82 of the *Financial Management Act 2006* 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. Recently, we slightly modified the approach and therefore we have attached it to this report to bring the changes to the attention of Parliament. But essentially, the key activities involve:

- a review of agency documents
- a review of any advice provided to the relevant Minister by agencies, the State Solicitor's Office (SSO) or other legal advisers
- interviews with key persons including discussions about our draft findings and the Auditor General's opinion.

Disclaimer of Opinion

I have been unable to obtain sufficient appropriate evidence on the Minister for Sport and Recreation's decisions not to provide information to Parliament about the arrangements for the new Perth Stadium. Accordingly, I am unable to form an opinion whether those decisions were reasonable and appropriate.

This is because the Department of Sport and Recreation (DSR) declined my request to view the legal advice on which it relied when it advised the Minister not to provide the information to Parliament.

DSR said it was told by the State Solicitor's Office (SSO) that the legal advice was protected by legal professional privilege (LPP) and DSR did not have authority to give us access. Only the Attorney General has the authority to waive LPP and based on discussions with SSO, DSR said it saw no reason to ask the Attorney General to waive privilege.

Because this legal advice was crucial to DSR's advice to the Minister, my inability to view this material meant that I was unable to reach an opinion on those decisions.

The inability of an auditor to access the information they need to meet their obligation is a serious matter for the auditor and for those who rely on their opinion. The SSO has previously advised me that the *Auditor General Act 2006* did not provide my Office with the authority to demand access to legal advice, though this is the first time I have been unable to fulfil my legislative obligations. In the event that an auditor is unable to obtain sufficient appropriate audit evidence, auditors have few options. One of these is to issue a Disclaimer of Opinion. Appendix 2 provides some background to this issue.

Background

The three decisions to refuse to provide information to Parliament related to requests made to the Minister for Sport and Recreation on 10 September 2014, 3 February 2015 and 16 March 2015. In the time between the first and second question being asked, the Minister, the Hon Terry Waldron MLA resigned as Minister and was replaced by the Hon Mia Davies MLA.

In all three cases the Minister decided that the information sought was commercial-in-confidence and would not be provided. The Ministers notified the Auditor General of their decisions not to provide the requested information on 28 October 2014, 16 March 2015 and 23 April 2015 respectively.

The first request was made in the Legislative Assembly and was in 16 parts. On 14 September 2014, the then Minister, the Hon Terry Waldron MLA, declined to provide the information asked for in parts (a), (d), (h) and (k), which was:

- (a) Westadium's anticipated internal rate of return
- (d) Westadium's total cost of capital
- (h) expected income from revenue-generating opportunities to be managed by Westadium
- (k) annual payments by the State to Westadium

The second request during the Legislative Council's Standing Committee on Estimates and Financial Operations' (EFOC) hearing on the annual report of DSR sought information on:

1. the expected net present value of the commercial opportunity revenue (see A5 in Table 1), which is the same as (h) above
2. various annual payments under the contract (see A6 and A7 in Table 1), which are similar to (k) above.

On 25 February 2015, the Hon Mia Davies MLA, refused to provide the above information.

The third request also arose from the EFOC hearing. After the hearing, the EFOC Chair wrote to the Minister reminding her of the request for an unredacted copy of the State's agreement with the Westadium consortium.

On 21 April 2015, the Hon Davies declined to provide the unredacted contract.

The full questions and the Ministers' responses are included in Appendix 1.

Key Findings

We were unable to access DSR's legal advice

Each Minister properly sought advice from the Department of Sport and Recreation (DSR) before responding to the requests. DSR told us it recommended that all the requests be declined.

DSR advised that its recommendations to the Minister to decline all three requests for information were based on its assessment that all the requested information was commercial-in-confidence and on legal advice from the State Solicitor's Office (SSO).

We asked to see the legal advice DSR received. DSR said it was advised by the SSO that the advice was protected by legal professional privilege (LPP) and that release of the information to the Auditor General would result in the information losing its protected status. DSR also said that it was advised that it did not have the authority to disclose it to us. This is because only the Attorney General had the authority. However, DSR did show us emails and a redacted copy of a briefing note that confirmed that it had obtained SSO advice on Parliament's requests.

Later, we asked DSR if it had considered seeking the Attorney General's approval to waive the privilege. In response, DSR said:

The SSO has advised that the Office of the Auditor General is not entitled to see documents which are subject to LPP. The Minister for Sport and Recreation relied on the advice in reaching their decision on what to provide in response to the Original PQ (Parliamentary Question).

The SSO has advised that it is not customary for departments to provide copies of this sort of documentation or advice. The SSO has also advised that LPP documents can be waived by the Attorney General in conjunction with the Premier and respective Minister however in this case there does not seem to be a need for the advice to be waived.

Therefore there seems no specific reason why consideration should be given to obtaining the Attorney General's approval to waive the advice.

Our inability to review the legal advice that DSR said it relied upon when advising the Minister limits the scope of our work. We also sought to assess the nature of the requested information against our standard commercial-in-confidence criteria but were again affected by a lack of sufficient appropriate evidence – see the next section of this report.

In the absence of this information, it is not possible to form an opinion as required by the AG Act. The Australian Auditing and Assurance Standards which we comply with when conducting our audits and investigations requires auditors to have sufficient appropriate evidence on which to base an opinion.

We could not complete our assessment against commercial-in-confidence criteria

During our investigation we sought evidence that DSR assessed the requested information against recognised commercial-in-confidence criteria.

In relation to Parliament's request for information on 10 September 2014, DSR provided us with a copy of the responses it drafted for this first request. However, we considered this material to be inadequate as it failed to demonstrate that the advice to the Minister was formed from an assessment against recognised commercial-in-confidence criteria. DSR advised that an assessment was done but could not provide evidence to show that it was done before making its recommendation to the Minister.

In relation to the information requested on 3 February and 16 March 2015, DSR said it provided full briefing notes at Minister Davies' request. We considered this a significant improvement in the process for providing advice. A copy of a briefing note was provided to us but it did not include any of the attachments that referred to the legal advice.

Even though DSR did not provide the full briefing notes, we were still able to consider whether the above information satisfied our standard commercial-in-confidence criteria. Three of the four criteria were met but we were unable to conclude on one:

1. **The information to be protected must be specifically identified.** This criterion was met. The agreement included a list of information to be treated as commercial-in-confidence. The list included the information requested on 10 September 2014 and 3 February 2015.
2. **The information must be 'commercially sensitive' meaning that it should not generally be known or ascertainable.** This criterion was met. The requested information was put together as part of the confidential negotiations between the State and Westadium. We found no evidence that the requested information was generally known or ascertainable.
3. **Disclosure would cause unreasonable detriment to the owner of the information or another party.** We were unable to conclude on this criterion. This criterion seeks to establish and balance any detriment or harm that releasing the information could cause to the State or another party against the information needs of Parliament and the public. In this instance, we are aware that both the Parliament and the public have demonstrated a clear interest in this information. Agencies when faced with this type of issue typically seek legal advice. However, our inability to view DSR's full briefing notes to the Minister and its legal advice meant that we could not conclude on this criterion.
4. **The information was provided under an understanding that it would remain confidential.** This criterion was met. DSR told us that Westadium requested confidentiality for the information during negotiations. DSR also told us that the State accepted the request. We noted that the agreement signed by the State and Westadium contained a detailed confidentiality obligation.

Table 1 below provides further explanations of our assessment against criterion 3.

Information requested		Reason provided by DSR in response to queries	Auditor General comments
(a)	Westadium's internal rate of return	'This is highly sensitive information and reflects Westadium's expected profit. Releasing this information will affect the consortium's ability to competitively bid for future projects ... and make the information available to consortium's competitors.'	This appears to satisfy criterion 3.
(d)	Westadium's total cost of capital	This highly sensitive information includes the terms under which Westadium has procured financing from debt and equity providers. Members within the Westadium consortium would be disadvantaged if their competitors were to obtain this information.	This appears to satisfy criterion 3.
(h) and A5	Commercial opportunity revenue	Westadium has not yet entered into any contracts with potential tenants for the 500 square metres of commercial space. However, Westadium has underwritten the projected revenues for the commercial opportunities and the State is entitled to receive a share of the revenues earned above the projected revenues. As Westadium is yet to enter into contracts with tenants the release of the underwritten values could seriously compromise their negotiating position with potential tenants. Due to the revenue share regime the State would also be disadvantaged if Westadium's negotiating position were to be compromised.	It appears reasonable that this information would be confidential until negotiations have been concluded.
(k), A6, A7	Annual payments to be made to Westadium over the term	<p>The profile of the annual availability payments over the 25 year term that Westadium has proposed is unique to its bid, and Respondent Members within the Westadium consortium would be disadvantaged in future tender submissions if their competitors were to obtain this information. Further, if this information were revealed it would disadvantage negotiations between Westadium and prospective subcontractors for the Operating Phase.</p> <p>In addition the State is currently negotiating with future users of the Stadium (such as the Joint Football Working Group) on their contributions to the Stadium related costs over the term. In these negotiations the State has requested the users to provide a monetary contribution based on an 'average' annual payment, whereas the annual availability payments proposed by Westadium are 'lumpy' and increase towards the end of the term. Therefore, the State's negotiating position with the users of the Stadium could be compromised by disclosing the annual availability payments of the 25 year term.</p>	<p>There is a clear public interest in Parliament and the public having access to information about government's payment obligations to Westadium over the 25 years of the contract. Whether the release of specific payment details is reasonable in the public interest would need to be balanced against the potential detriment that release would cause. In the absence of the more detailed Ministerial briefing notes and the legal advice, it was not possible to form a view on whether the potential detriment would be unreasonable.</p> <p>In particular, it was unclear to us why this information should remain confidential for the full term of the contract.</p>

Table 1: Review of requested information against criterion 3

The requested information in Table 1 above was redacted from the agreement disclosed on the Department of Treasury's website. In light of the findings set out above, we saw no need to separately assess any other redacted elements of the contract.

Other Findings

DSR's approach to advising the Minister on the first request from Parliament was generally not comprehensive or fully documented. Our experience with other agencies shows that this is not unusual. We recommend that all agencies ensure that any recommendation that a Minister not provide requested information to Parliament concerning the conduct of an agency is thoroughly considered and documented. This is likely to involve:

- assessing information considered commercial-in-confidence against recognised criteria
- full consideration of the public interest and Parliament's need to access information.

Response from the Department of Sport and Recreation

The Department of Sport and Recreation (DSR) has followed all procedures and the law as directed by the State Solicitor's Office (SSO) and Executive Government. DSR has been responsive in providing all information requested by the Auditor General with the exception of protected legal advice.

The information that was withheld related to Westadium's internal rate of return, total cost of capital, revenue from Commercial Opportunities and Annual Payments to Westadium over the term of the Contract.

In the right circumstances sensitive commercial and legal information is protected because disclosure will harm the States capacity to obtain the best deal for taxpayers. If all of a commercial enterprises' best work was revealed to its competitors it would severely disadvantage their position and future willingness to engage with the State.

The release of protected legal advice to the Auditor General would result in sensitive commercial and legal information losing its protected status and potentially making it available to their competitors. This has been a long standing technical issue of law. It might be a reasonable consideration to change the *Auditor General Act 2006* to allow the Auditor General to access protected legal advice yet still allow for that advice to retain its protected status.

There is a significant amount of contractual information on both the Treasury and Perth Stadium websites. By providing as much information as possible, whilst following all lawful requirements of legislation, all at DSR are endeavouring to keep the community fully informed and to promote the public interest, whilst meeting all accountability requirements.

DSR was unable to give the Auditor General access to the protected legal advice because the Director General does not have the power or the authority to release protected legal advice, this rests with the Attorney General. The Auditor General did request that DSR seek a waiver of privilege from the Attorney General. DSR then referred that request to SSO who then advised for legal reasons that the request be denied. Further and based on advice from SSO, the Auditor General in the first instance did not have a statutory power to ask DSR to release protected legal advice.

Notwithstanding the above, the Auditor General's assessment is that both the internal rate of return and total cost of capital appeared to meet all four criteria for being Commercial in Confidence. The Auditor General notes that it appeared reasonable that the information for the commercial opportunities be retained as confidential until negotiations have been concluded.

I emphasize that all of the staff at DSR have followed all procedures and the law as directed by the SSO and Executive Government. DSR has been responsive in providing all information requested by the Auditor General with the exception of protected legal advice.

Appendix 1: Parliamentary questions and the Ministerial responses

Name of person seeking information in Parliament and date	The parliamentary question to which the Minister refused to give information	Minister for Sport and Recreation's response
Mr Ben Wyatt MLA on 10 September 2014	I refer to the selection of the WESTADIUM consortium to deliver the new stadium at Burswood and ask:	
	(a) What internal rate of return does WESTADIUM anticipate it will receive from this project?	'The internal rate of return is classified as commercial-in-confidence information in the contract between the State and WESTADIUM.'
	(d) Will the Minister disclose WESTADIUM's total cost of capital?	'No. WESTADIUM's total cost of capital is classified as commercial-in-confidence.'
	(h) If yes to (g) what are they and what are the expected revenues that will be realised from each of these opportunities? Note, (g) asked 'are there any revenue-generating opportunities managed by WESTADIUM indirectly related to the stadium's operations including the retail precinct to be built directly adjacent to the stadium?'	'The commercial opportunities, and the expected revenues that will be realised from each, have not been fully determined at this time. Any revenue from the commercial opportunity available to WESTADIUM is commercial-in-confidence.'
	(k) What are the annual payments that the State Government will be making to WESTADIUM over the 25 years from the completion of the new stadium? ¹	'The annual payments to be made to WESTADIUM over the 25 years are commercial-in-confidence.'
Hon Ken Travers, MLC, as Chair of the Estimates and Financial Operations Committee on 3 February 2015	A5 The 500 square metres: was there a value attached to that in determining the NPV for the contract? As well as whether there was a value, if you are taking it on notice, I would like the value that was attached to that 500 square metres of commercial space. What value was attached to that in terms of the contract? ² What are the ongoing annual payments required by the State under the contract?	'WESTADIUM has not currently entered into any contracts with potential tenants for the 500 square metres of commercial space. WESTADIUM has underwritten the projected revenues for the commercial opportunities and the State is entitled to receive a share of the revenues earned above the projected revenues. In relation to the question of ongoing annual payments please refer to the response to A6.'

¹ The request for annual payment information is similar to the requests for annual payment information in A5, A6 and A7 set out in this table.

² The 500 square metres of commercial space create the revenue generating opportunities referred to in (h). As such, we considered (h) and most of A5 overlapped.

Name of person seeking information in Parliament and date	The parliamentary question to which the Minister refused to give information	Minister for Sport and Recreation's response
	<p>A6 What are the ongoing annual payments required by the State under the contract? So, there was no technical reason why it could not be released? So, the technical and policy reasons for why it was not made and also what the ongoing annual payment is.</p>	<p>'The annual payments to be made to WESTADIUM over the 25 years are classified as commercial-in-confidence in the contract.'</p>
	<p>A7 So what I am interested in is what are the capital repayments each year, what is the State's contribution towards the ongoing life cycle maintenance costs on an annual basis and how they are calculated over the life of the contract.</p>	<p>'The annual capital costs and lifecycle maintenance costs are classified as commercial-in-confidence in the contract.'</p>
<p>Hon Ken Travers, MLC, as Chair of the Estimates and Financial Operations Committee on 16 March 2015 (via letter)</p>	<p>As part of A5, the Committee sought a copy of the unredacted copy of the contract to build the new Burswood Stadium, with information that should be kept confidential separately identified. This aspect of the question was not included in your response.</p>	<p>'Some of the redacted information was agreed between Westadium and the State to be retained as confidential in light of its commercially sensitive nature. If released this could jeopardise future negotiations as prospective tenderers may be apprehensive of entering into contracts with the State if their commercially sensitive information becomes public.</p> <p>Further information was redacted as the release could disadvantage the State in future negotiations of this kind as it would highlight the terms and conditions accepted by the State for this transaction, whereas those terms and conditions may not be appropriate to future contracts for different projects.</p> <p>A redacted version of the contract is available on the Treasury website and a copy can be provided to the Committee if required. This was redacted in accordance with the State Government policy on public private partnerships.'</p>

Appendix 2: Access to information protected by legal professional privilege

It is a professional requirement for auditors to have access to information they consider necessary to perform their duties. In the absence of such access, auditors have few options. One of these is to issue a Disclaimer of Opinion.

I was compelled to issue a Disclaimer of Opinion for the Notices mentioned in this report because DSR, acting on the State Solicitor's Office (SSO) advice, declined to provide me with access to documents on which it relied when advising its Minister about the information requests from Parliament.

DSR said it was told by the SSO that the documents were subject to legal professional privilege and my Office was not entitled to see such documents. DSR also said SSO had advised that it is not customary for departments to provide copies of this sort of documentation or advice to my Office.

Agencies regularly provide me with access to such documents. This access is often critical to my work, including the giving of opinions on agency annual financial statements.

DSR acknowledged that SSO had told it that legal professional privilege can be waived by the Attorney General in conjunction with the Premier and respective Minister. However it said 'in this case there does not seem to be a need for the advice to be waived'.

Our natural justice process for finalising this report involved providing the Attorney General and the SSO with a copy of the draft report. The SSO suggested amendments largely to correct technical inaccuracies. These suggestions were considered in finalising this report.

I consider that my access to documents subject to legal professional privilege is entirely consistent with the spirit and intent of the *Auditor General Act 2006* (the AG Act). The Explanatory Memorandum accompanying the Auditor General Bill noted:

The clause (Clause 36) ensures that the Auditor General has the power to access all information necessary for the performance of his or her functions. Access to Cabinet documents would be available and claims of legal professional privilege would not be maintainable.

However, advice the SSO has previously provided to me is that Parliament's intent as evidenced by the Explanatory Memorandum was not achieved by the AG Act and hence the Act would need amending to give that authority.

Broadly speaking, the SSO's advice was that the confidentiality of such information is derived from common law, that is, unwritten law. Section 36(2) of the AG Act states that a person must provide information to the Auditor General '.... despite any duty of secrecy or confidentiality that a person has under another written law'. The SSO's view is that confidentiality derived from unwritten law is not covered in this or any other section of the AG Act.

I will seek every opportunity to pursue the SSO's recommendation to amend the AG Act.

Updated Audit Practice Statement

The following is an updated version of our Audit Practice Statement, which we officially publish on our website at www.audit.wa.gov.au/howweaudit.php.

This updated practice statement provides some further guidance and clarification for agencies on criteria they can use to assess the commercial confidentiality of information.

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.

How soon must the Minister send a notice?

Section 82 requires a Minister to issue the Auditor General with a notice within 14 days of making the decision not to provide the information to Parliament.

The receipt of a notice under section 82 of the FM Act triggers the Auditor General's obligation to provide an opinion to Parliament. However, the Auditor General may also take action if he becomes aware that a Minister has decided not to provide information to Parliament and has not issued a notice within the 14 day statutory requirement. Such action could for instance include contacting the Minister to advise them of the legislative requirement.

When are Section 82 notices not required?

A notice under section 82 of the FM Act is unlikely to be required in the following circumstances:

- 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 the conduct or operation of an agency as required by the FM Act
- the information is already being sought under the *Freedom of Information Act 1992* (however, refusal to provide information simply because it can be accessed under the Freedom of Information Act is likely to be considered unreasonable and not appropriate)
- the Minister refers the request for information to another Minister, with responsibility for the agency in question.

If there is uncertainty about the above, then we recommend that the Minister issue a notice.

If a notice falls into one of the above categories, the Auditor General may form the view that the notice was unnecessary and an opinion pursuant to section 24(2)(c) of the AG Act is not required. In this event, the Auditor General will advise the Parliament of this assessment.

Methodology

All notices received under section 82 of the FM Act lead to an assessment. If the notice was valid, then an opinion on the reasonableness and appropriateness of a Minister's decision will be included in a report to Parliament as required by section 24(2)(c) of the AG Act.

The steps in our process are:

1. Determine whether the notice was required by section 82 of the FM Act. If the notice was not required (not valid), then the Auditor General will inform the Minister and the Parliament.
2. If the notice was required, a review of the information in the notice, including the Minister's explanation for the decision, will occur. Our review will include discussions with ministerial and agency staff and examination of all relevant documents and advice provided to the Minister. For instance:
 - If the Minister's reason for not providing information was that it requires diversion of resources or a similar reason, then the Auditor General will consider whether the resources required to collect the information would be manifestly unreasonable. Our review would reflect on Parliament's need for information and a Minister's responsibility to ensure the efficient and effective use of their agencies' resources.
 - If the Minister's reason for not providing the information was that it is commercially confidential, then our assessment of the information will include considering whether non-disclosure meets the public interest test (see discussion below).
3. Based on this detailed review, an opinion will be provided that the Minister's decision was either:
 - reasonable and therefore appropriate, or
 - was not reasonable and therefore not appropriate.

Reporting

The Auditor General's opinion and the reasons for reaching the opinion are included in a report tabled in the Parliament. The tabling of the report occurs as soon as feasible after the opinion is determined.

Our natural justice process includes advising the Minister of the Auditor General's opinion before tabling the report. As well, we will advise the Member of Parliament who sought the information of the report's tabling date.

Commercial-in-confidence and public interest

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: www.ags.gov.au/publications/legal-briefing/br64.htm.

In applying the following criteria, it is important to draw the distinction between information that is commercial-in-confidence to a commercial third party and information generated by and commercial- in-confidence to government.

The criteria we use are:

1. If the information is commercial-in-confidence to a commercial counterparty, it 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.

Criterion one is critical when assessing information provided to government by a third party. 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 limits the capacity of a Minister to cite commercial-in-confidence as a ground to not provide information to Parliament. Section 81 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'.

Government contracts typically reflect this requirement in a standard clause that allows the disclosure of confidential information if it is 'required by any law, judicial or parliamentary body or governmental agency'.

Exemption from the section 81 requirement would require non-disclosure to be in the 'public interest'. That is, disclosure would likely cause underlying harm to the public interest and the extent of the probable harm is sufficient to outweigh reasons for disclosure. For instance, disclosure could:

- damage current government negotiations
- have a negative effect on future government procurement.

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