

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 10: June 2016

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

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**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*. It provides my opinions on the reasonableness and appropriateness of 3 decisions by 2 Ministers not to provide information to Parliament.

- One decision by the Minister for Lands, the Hon Terry Redman MLA, not to provide Parliament with legal advice received from the State Solicitor's Office regarding the State's obligation to sign the BHP Billiton Kurra Village lease renewal.
- Two decisions by the Treasurer, the Hon Dr Mike Nahan MLA, on the details of disputes between the head contractor at Perth Children's Hospital, John Holland Pty Ltd, and its subcontractors and the value of each of the disputes between John Holland and its subcontractors.

I wish to acknowledge the staff at the agencies involved for their cooperation with this report.

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

COLIN MURPHY
AUDITOR GENERAL

8 June 2016

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 3 decisions by 2 Ministers not to provide information to Parliament.

- One decision by the Minister for Lands, the Hon Terry Redman MLA, not to provide Parliament with legal advice received from the State Solicitor's Office regarding the State's obligation to sign the BHP Billiton Kurra Village lease renewal.
- Two decisions by the Treasurer, the Hon Dr Mike Nahan MLA, on the details of disputes between the head contractor at Perth Children's Hospital, John Holland Pty Ltd, and its subcontractors and the value of each of the disputes between John Holland and its subcontractors.

Section 82 of the *Financial Management Act 2006* (FM Act) requires a Minister who decides that it is reasonable and appropriate not to provide certain information to Parliament, to 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* requires the Auditor General to provide an opinion to Parliament as to whether the Minister's decision was 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
- 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 agency persons including discussions about our draft findings and the Auditor General's opinion.

Our procedures are designed to provide sufficient appropriate evidence to support an independent view to Parliament on the reasonableness and appropriateness of the Minister's decision.

We have not performed an audit, however our procedures follow the key principles in the Australian Auditing and Assurance Standards.

Ministerial decision to not provide legal advice received from the State Solicitor's Office in regard to the BHP Billiton Kurra Village lease renewal

Opinion

The decision by the Minister for Lands not to provide Parliament with the legal advice received from the State Solicitor's Office in regard to the State's obligation to sign the BHP Billiton Kurra Village lease renewal, was reasonable and appropriate.

Background

In Parliament on 19 November 2015, Hon Stephen Dawson MLC asked the Minister for Lands for the following information:

- (1) What is the government's position in relation to the extension of the proposed lease renewal?
- (2) On what date did BHP Billiton originally submit the lease renewal request to the Minister for Lands for approval?
- (3) On what date was advice provided to BHP Billiton from the Minister in response to the lease renewal request?
- (4) Has the Minister sought advice from the State Solicitor's Office to clarify whether the state has a statutory obligation to sign the lease; and, if yes, on what date was the advice sought?
- (5) If yes to (4), will the Minister table a copy of the advice; and, if not, why not?

The Minister provided an answer to parts (1) to (3) on 19 November, 2015. In response to part (4) the Minister confirmed that advice was sought from the State Solicitor's Office (SSO), but he declined to provide a copy of the legal advice (part 5) as he considered it was subject to legal professional privilege.

On 10 December 2015, the Minister notified the Auditor General of his decision not to provide the information requested in part (5), in accordance with section 82 of the FM Act.

Note: Definition of client legal privilege

Client legal privilege often referred to as 'legal professional privilege', is a common law right that exists to protect the administration of justice and the right of individuals and other entities to obtain confidential advice about their legal circumstances. It protects legal advice given by a lawyer to his or her client and communications pertaining to actual or contemplated litigation or court proceedings. Client legal privilege also promotes compliance with the law. Since lawyers owe a paramount duty to the court and the administration of justice, they are required to encourage clients to obey the law. Lawyers enable clients to do this by advising on relevant obligations and helping to detect and address potential and actual breaches'.¹

¹ Law Council of Australia. (2016) www.lawcouncil.asn.au, accessed 10 May 2016.

Key findings

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

The Minister properly sought advice from the Department of Lands (Department) before responding to the request. The Department recommended that he not provide the information requested in part (5) as it was legal advice and subject to legal professional privilege.

The Department advised that it based its recommendation on an assessment by a legal officer in its Legal Services unit. This assessment was not documented. We suggested to the Department that it document all such assessments as they form the reasons for the recommendation.

Consistent with a previous opinion² given on legal professional privilege, we relied on guidance from the Victorian Government Solicitor's Office in an article titled 'Understanding legal professional privilege'³:

For legal privilege to apply, communications between the client and lawyer '...must be for the "dominant purpose of legal advice or in relation to actual or anticipated litigation ...". If the dominant purpose test is met, then legal professional privilege extends to:

- notes, memoranda or other documents made by staff of the client, if those documents relate to information sought by the client's legal advisor to enable legal advice to be provided
- a record or summary of legal advice even if prepared by a non-lawyer but not to the client's opinions on or stemming from the legal advice
- drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer whether or not they are actually communicated to the lawyer
- the lawyer's revisions of the clients draft correspondence'.

We asked to see the SSO's legal advice but were refused, as it is the SSO's view that release of the information to the Auditor General would result in the information losing its protected status. This is the second occasion in recent times that we have been refused permission to sight legal advice⁴.

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 that the *Auditor General Act 2006* does not provide us with the authority to demand access to legal advice.

On this occasion, we were able to obtain sufficient audit evidence to form an opinion after the Department provided a certification from the State Solicitor. The certification confirmed that the information requested by Parliament (the SSO advice) was legal advice provided by his staff to the Department concerning the BHP Billiton Kurra Village lease renewal.

On this basis, we accept that the information requested by Parliament is subject to legal professional privilege.

² *Opinions on Ministerial Notifications*, Report 9, June 4, 2015, pp5-6.

³ Victorian Government Solicitor's Office. (2007) *Understanding Legal Professional Privilege*, pp1-2

⁴ *Opinions on Ministerial Notifications*, Report 19, August 27, 2015, pp 6-8

Response from the Department of Lands

The Department of Lands acknowledges the work of the Auditor General in undertaking an examination of the Minister for Lands' decision not to provide legal advice received from the State Solicitor's Office to Parliament and the conclusion that the decision was reasonable and appropriate. The Department acknowledges the recommendation of the Auditor General that it document all assessments of legal professional privilege on the relevant file and confirms that it will adopt the recommendation as best practice. However, the documenting of the assessment may follow the giving of the advice because the Department often has to respond urgently to a Question Without Notice within very short timeframes.

Ministerial decisions to refuse to provide information about disputes between John Holland and its subcontractors

Opinion

The decisions by the Treasurer not to provide Parliament with information about disputes between John Holland and its subcontractors on the Perth Children's Hospital project were reasonable and appropriate.

The information requested was the details and value of ongoing disputes between John Holland and its subcontractors.

Background

The State has contracted John Holland to design and construct the Perth Children's Hospital. John Holland contracts numerous subcontractors to work on the project. The Department of Treasury (Treasury) is responsible, on behalf of the State, to ensure John Holland complies with the contract. The State is not a party to the contracts between John Holland and its subcontractors but Treasury is required under the contract to oversee John Holland's supervision of the work of the subcontractors.

On 15 September 2015 (Parliamentary Question 3402) and 20 October 2015 (Parliamentary Question 1220), Hon Kate Doust MLC asked the Minister for Mental Health representing the Treasurer for information about variations, disputes and payments between John Holland and its subcontractors.

The Treasurer answered PQ 3402 on 14 October 2015 and PQ 1220 on 21 October 2015, but declined to provide the details and value of each of the disputes. The Treasurer's reason was that each dispute is subject to ongoing, confidential resolution processes and disclosure has the potential to adversely impact on those processes.

Appendix 1 of this report includes the full questions and responses.

The Treasurer notified the Auditor General on 23 October (PQ 3402) and 27 October 2015 (PQ 1220) of his decisions not to provide the information.

Prior to considering whether the Minister's decisions were reasonable, we formed a view about whether Treasury's responsibilities in relation to John Holland and the subcontractors form part of the conduct or operations of Treasury. Section 82 of the FM Act only requires a Minister to give a notice to the Auditor General of a decision not to provide information to Parliament when the information concerns the 'conduct or operations of an agency'.

In our view, based on State Solicitors' Office (SSO) advice we received in March 2015, the information does relate to the conduct or operation of the Treasury and therefore Section 82 notices were required.

Key findings

The 2 decisions by the Treasurer not to provide the requested information were reasonable and appropriate. But Treasury could have provided the Treasurer with more detailed information on which to base his decisions.

The Treasurer appropriately sought advice from Treasury before responding to both questions. Treasury's advice was not to disclose the information because the disputes were

part of ongoing, confidential dispute resolution processes and disclosure could adversely affect the outcomes.

Prior to the parliamentary questions from the Hon Kate Doust MLC, Treasury obtained legal advice in June 2015 from SSO about its right to request information about disputes between John Holland and its subcontractors.

The SSO advised Treasury that it was entitled under the State's contract with John Holland to ask John Holland for information. On 17 September 2015, Treasury sought the SSO's advice regarding PQ 3402. The SSO confirmed Treasury's position that disclosing any detail concerning the disputes has the potential to adversely impact the dispute resolution.

Treasury asked John Holland for the number of current disputes before advising the Treasurer on PQ 3402. John Holland replied that they were currently engaged in disputes with 5 subcontractors.

Treasury told us it had carried out due diligence to confirm that the disputes were all confidential or being dealt with through the confidential dispute resolution processes in the *Constructions Contract Act 2004 (CCA)*, prior to advising the Treasurer not to disclose details about these disputes. However, Treasury could not demonstrate that this due diligence was rigorous or supported its advice to the Treasurer.

In the absence of details about the disputes, we assessed if the Minister's decisions were reasonable and appropriate based on the confidentiality criteria we would normally use, but modified to suit this purpose.

We concluded that the details of the disputes were most likely 'commercially sensitive' and not generally known or ascertainable, and disclosure could cause unreasonable detriment to John Holland or its subcontractors. Our determination was based on:

- disputes dealt with through the CCA process are generally considered confidential. Section 50 of the CCA requires the Building Commissioner to keep the identities of the parties to an adjudication confidential and not to release any information in an adjudication that, because of its confidential nature, is not suitable for publication. However, if suitable for publication, then the Minister would be justified in releasing that information
- the standard contract between John Holland and its subcontractors includes confidentiality provisions that can apply to dispute resolution processes
- publication of individual names and values may disrupt dispute resolution processes and could cause unreasonable detriment to one or both parties
- only limited publicly available information was found about disputes between John Holland and its subcontractors. We were unable to determine if the information that was publicly available related to the disputes in question.

We note that Treasury did not seek advice from John Holland before advising the Treasurer on PQ 1220 that related to the value of each of the contractual disputes. Had Treasury sought information from John Holland about the value of the disputes, the Treasurer could have considered whether to release some de-identified or aggregate information.

Response from the Department of Treasury

The Department of Treasury (Treasury) acknowledges the Summary of Findings and accepts its key findings in full. The conclusions and findings outlined in the report will be taken into account by Treasury when addressing similar issues in future.

Appendix 1

The full question and response referred to in this report is included in Parliament's Hansard as follows:

Parliamentary Question on Notice 3402 in the Legislative Council on Tuesday, 15 September 2015

Hon Kate Doust to the Minister for Mental Health representing the Treasurer:

"I refer to the new Perth Children's Hospital and the head contractor John Holland:

- (a) how many confirmed variations are there on the project to date:
 - (i) what are the details and cost of each variation:
- (b) how many ongoing disputes are there between John Holland and subcontractors who have worked, or are working, on the site:
 - (i) what are the details of each of the disputes; and
- (c) at any point throughout the life of the project, has the Government asked John Holland to detail all:
 - (i) subcontract contract values;
 - (ii) approved variations;
 - (iii) items in dispute;
 - (iv) superintendent's instructions to undertake work; and
 - (v) payments made to each subcontractor?"

On 14 October 2015 Hon Dr M.D. Nahan replied:

- "(a) At 30 September 2015, there were 122 executed variations to the Perth Children's Hospital Managing Contractor (MC) Contract between the State and John Holland Pty Ltd.

Large numbers of contract variations are commonplace on highly complex, major projects such as the Perth Children's Hospital, particularly where design is an interactive process involving extensive and ongoing consultation with key stakeholders such as clinical user groups.

By way of example, for the Fiona Stanley Hospital project, there were in excess of 350 variations to the MC Contract. This contract achieved Practical Completion on time in December 2013 and the project was delivered within budget.

- (i) The total cumulative value of the 122 variations approved to 30 September 2015 is \$38,518,701. Summary details of the variations are provided in the attached table, including the value of each variation. [Please see tabled paper no 3512]
- (b) John Holland Pty Ltd has advised that as at 30 September 2015, it was engaged in five contractual disputes with its subcontractors.
 - (i) The details of these disputes will not be disclosed as each of the matters is subject to ongoing, confidential dispute resolution processes involving the contracting parties to the relevant subcontracts and disclosure has the potential to adversely impact on those dispute resolution processes.

- (c) John Holland Pty Limited has complied with its obligations under the Perth Children's Hospital MC contract to provide details of its subcontractors to the State, either under its specified reporting obligations or where otherwise requested by the State. Specifically:
- (i) John Holland Pty Ltd has provided details of the value of subcontracts is executed where the award value exceeds \$100,000;
 - (ii) John Holland Pty Ltd has provided the value of subcontract variations it has approved;
 - (iii) John Holland Pty Ltd has advised the number of contractual disputes under subcontracts it has executed and has provided further details of selected disputes when requested by the State;
 - (iv) The State has not requested that John Holland Pty Ltd provide details of all instructions it has issued to its subcontractors to undertake work; and
 - (v) John Holland Pty Ltd has provided details of payments under selected subcontract it has executed when requested by the State."

Parliamentary Question without Notice 1220 in the Legislative Council on Tuesday, 20 October 2015

Hon Kate Doust to the Minister for Mental Health representing the Treasurer.

"I refer to the answer to question on notice 3402 relating to John Holland and the Perth Children's Hospital project and ask:

- (1) Can the Treasurer please outline the value of each of the five contractual disputes between John Holland and its subcontractors?

On 21 October 2015 the Treasurer declined to provide the information saying:

No – the disputes are subject to ongoing, confidential dispute resolution processes involving the contracting parties to the relevant subcontracts, and disclosure of any assessment of value has the potential to adversely impact on the dispute resolution process.

Auditor General's Reports

Report No.	Reports 2016	Date Tabled
9	Payment of Construction Subcontractors – New Perth Children's Hospital	8 June 2016
8	Delivering Services Online	25 May 2016
7	Fitting and Maintaining Safety Devices in Public Housing – Follow-up	11 May 2016
6	Audit of Payroll and other Expenditure using Data Analytic Procedures	10 May 2016
5	Audit Results Report – Annual 2015 Financial Audits – Universities and state training providers – Other audits completed since 1 November 2015; and Opinion on Ministerial Notification	10 May 2016
4	Land Asset Sales Program	6 April 2016
3	Management of Government Concessions	16 March 2016
2	Consumable Stock Management in Hospitals	24 February 2016
1	Supplementary report Health Department's Procurement and Management of its Centralised Computing Services Contract	8 June 2016 17 February 2016

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