Western Australian Auditor General’s Report

Opinions on Ministerial Notifications

Report 18: August 2016
Opinions on Ministerial Notifications
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 3 Ministers not to provide information to Parliament.

- One decision by the Minister for Education, the Hon Peter Collier MLC, not to provide to Parliament a copy of the Department of Education’s Strategic Asset Plan.
- One decision by the then Minister for Health, the Hon Kim Hames MLA, not to provide to the Estimates and Financial Operations Committee a copy of the Department of Health’s Strategic Asset Plan.
- One decision by the Minister for Police, the Hon Liza Harvey MLA, not to provide to the Estimates and Financial Operations Committee information on the maintenance backlog for police facilities in 2014-15.

All 3 Ministers claimed that the information sought was covered by Cabinet confidentiality and could therefore not be provided to Parliament. Cabinet-in-confidence protects disclosure of information that would reveal deliberations and decisions of Cabinet. This is the first time we have had to consider whether Cabinet confidentiality applied to information that a Minister had decided not to provide to Parliament.

Two decisions involved refusal to provide a strategic asset plan (SAP). The other decision involved a refusal to provide the dollar value of maintenance backlog for police facilities that was claimed to be in a SAP. An agency’s SAP serves a dual purpose. They are used for business planning to identify and prioritise investment needs and also as a source of content into the state’s budget process and Cabinet decisions.

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

COLIN MURPHY
AUDITOR GENERAL
11 August 2016
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Ministerial decisions not to provide information to Parliament

Introduction

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

- One decision by the Minister for Education, the Hon Peter Collier MLC, not to provide to Parliament a copy of the Department of Education’s Strategic Asset Plan.
- One decision by the then Minister for Health, the Hon Kim Hames MLA, not to provide to the Estimates and Financial Operations Committee a copy of the Department of Health’s Strategic Asset Plan.
- One decision by the Minister for Police, the Hon Liza Harvey MLA, not to provide to the Estimates and Financial Operations Committee information on the maintenance backlog for police facilities in 2014-15.

Section 82 of the Financial Management Act 2006 (the 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 (AG Act) requires the Auditor General to provide an opinion to Parliament as to whether the Minister’s decision was reasonable and appropriate.

Background

Section 82 of the FM Act and section 24 of the AG Act follow the 1992 Royal Commission into the Commercial Activities of Government and the Commission on Government. However, the scope of the legislation goes beyond commercial information, and encompasses the withholding of any information relating to the conduct or operation of an agency.

This is the first occasion on which I have been required to provide an opinion in relation to information considered Cabinet-in-confidence (CIC). Cabinet confidentiality is an essential part of our system of government. So too is the requirement for Parliament to receive the information it needs to hold the State Government to account.

There is no science or statute to assist in determining what constitutes CIC. In arriving at my opinions, I received a wide range of sometimes conflicting views concerning CIC and the processes agencies should follow to give sound advice to their Minister.

My role is to form an independent view as to whether in the particular circumstances, it is reasonable and appropriate for the information to be withheld from Parliament. In reaching my opinion, I assess the soundness of advice provided by an agency to their Minister and the reasons given by the Minister for their decision. However, my opinion is not an assessment of the decision-making process.

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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 or other legal advisers
- interviews with key agency staff 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 a Minister’s decision. In forming the opinions, we give due regard to relevant laws and conventions as well as the importance of transparency and Parliament’s need for information so that it can hold government to account.

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

In arriving at the 3 opinions, we also spoke with the Department of the Premier and Cabinet (DPC) and the Department of Treasury (Treasury). The DPC is the Cabinet Secretariat and provides guidance to Western Australian agencies on Cabinet processes. Treasury is responsible for the implementation of the Strategic Asset Management Framework (SAMF), which includes strategic asset plans (SAPs). We also obtained legal advice from the Western Australian State Solicitor’s Office (SSO) and the Australian Government Solicitor.

We have made a recommendation to DPC on providing greater guidance on when CIC would apply. We have also made recommendations to Treasury on providing agencies with greater guidance on the SAP information. Please see page 16.

Cabinet-in-confidence

The decision by all 3 Ministers was that the information sought was CIC and they therefore could not provide it to Parliament. This is the first time we have had to consider whether Cabinet confidentiality applied to information that a Minister had decided not to provide to Parliament. We therefore sought to establish an approach that we could use to form a view about whether the decisions were reasonable and appropriate.

In doing so, we reviewed a range of Western Australian and national sources including the Western Australian and Commonwealth Cabinet Handbooks, papers on Cabinet confidentiality from the national Parliamentary Library and the New South Wales Department of Premier and Cabinet. We also looked at the Western Australian and Commonwealth Freedom of Information Acts. While there is considerable cross-over, we could not find an agreed list of documents to which Cabinet confidentiality would apply.

As a result, we based our examinations upon a consensus view of prominent sources that the core principle of CIC is to protect information that would reveal deliberations and decisions of Cabinet. We also considered the main purpose for the preparation of the information requested by the Parliament, and whether it was provided to Cabinet.

In conducting our examinations, we considered the following:

- Was the information created for the purpose of informing Cabinet or being discussed in Cabinet? Does it include policy options or recommendations prepared for submission to Cabinet?
Does the information contain material that would reveal the deliberations and decisions of Cabinet?

Is part or all of the information publicly available, or readily available within the agency? Information already in the public domain is unlikely to be confidential unless it reveals Cabinet deliberations. If parts or all of the information held within an agency are easily accessible by its staff (for example, stored in an unsecured location) then it also may not be reasonable to consider it confidential.

Did the Minister consider providing any sections of the information that would not reveal deliberations and decisions of Cabinet? In our view, it is important to consider whether Cabinet confidentiality applies to an entire document or to specific parts. In many cases, redacting parts of documents that would reveal the deliberations and discussions of Cabinet will be impractical. However, some documents are compendiums of a range of information and it may be possible for a document to contain parts that by their nature may reveal Cabinet deliberations and discussions, and significant and meaningful components that may not.

Further detail on how we derived our considerations is available in Appendix 1.

In applying these considerations, we kept in mind the advice of the Western Australian Cabinet Handbook which says that documents that are being prepared for Cabinet, but have not yet gone to Cabinet, should also be handled with care.

**Strategic asset plans**

Two notifications arose from a decision not to provide Parliament with a SAP. The other notification arose from a refusal to provide the dollar value of maintenance backlog for Western Australian Police facilities that was claimed to be in a SAP. The SAP is part of the SAMF which all state government agencies, and government trading enterprises, are required to adhere to. As outlined in guidance published by Treasury\(^2\), the purpose of the SAMF is to improve asset investment planning and management across the public sector.

A SAP is an essential business planning document and is updated each year even if an agency has few assets or no need to invest. In creating a SAP, an agency takes stock of its assets; demand for, and its ability to provide services; and sets out how it will deliver services in the next 10 years. An agency’s SAP identifies and prioritises investment needs and also informs the Minister, Treasury and Cabinet of budget demands and risks from which priority applications for budgetary funding are developed.

In creating a SAP an agency draws on a range of sources and information. Some of this may be public such as demographic information, and some may be internal to an agency such as reports on performance. The SAP includes an agency’s analysis of this information and its conclusions about its asset investment program, and its ability to provide services.

In consultation with Treasury, an agency’s SAP is updated each year to reflect new Cabinet decisions. These decisions may affect an agency’s priorities.

An agency is required to lodge its SAP with Treasury prior to making budget submissions to its Minister. When considering an agency’s budget submission, Treasury analysts draw upon the SAP for the business justification. The Treasury analysis and resulting advice accompanies the agency’s budget submission to Cabinet. DPC advised that none of the 3 agencies SAPs were provided to Cabinet, though this by itself does not eliminate CIC.

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Treasury advised all 3 agencies that the SAP is classified as CIC. Agencies accepted Treasury’s advice in advising their Ministers. This reflected prevailing arrangements for the handling of budget documents and is understandable.

However, the SAP in its current form serves a dual purpose as an agency business planning document and as a source of content into the state’s budget process. It may also contain certain publicly available information. Neither Treasury nor the agencies considered whether these could be reasons for recommending Parliament be provided with those parts of the SAP that would not reveal Cabinet deliberations. We recognise that in some circumstances, disclosing that publicly available information was included in source material for Cabinet could reveal Cabinet deliberations.

The dual role of the SAP has potential to cause confusion for agencies if called on to determine material that is CIC. Treasury guidance could reduce potential confusion by distinguishing elements of a SAP that may reveal Cabinet deliberations from those that can be released for scrutiny by Parliament.
Ministerial decision not to provide a copy of the Department of Education’s Strategic Asset Plan to Parliament

Opinion

The decision by Minister Collier not to provide Parliament with a copy of the Department of Education’s Strategic Asset Plan was not reasonable and therefore not appropriate. While some parts of the Department of Education’s Strategic Asset Plan would by their nature attract Cabinet confidentiality, other parts include some publicly available information of a factual and statistical nature and would appear suitable to be provided to Parliament.

Background

In the Legislative Council on 15 October 2015, Hon Sue Ellery MLC, asked the Minister for Education for the following information (parliamentary question without notice 1155):

I refer to the strategic asset plan referred to in the 2014-15 annual report.

Will the Minister table a copy; and, if not, why not?

Later on that same day after receiving advice from the Department of Education, the Minister refused to provide the information, saying:

The strategic asset plan is considered as part of the annual budget deliberation process and is therefore Cabinet-in-confidence.

On 13 January 2016, the Auditor General received the Minister’s notification 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 Department of Education’s (Department) strategic asset plan (SAP) was not reasonable and therefore not appropriate. I formed this opinion as information contained within the SAP was not prepared solely for consideration by Cabinet, and some of the information it contains is publicly available. The Minister did not consider, for instance, if he could provide a redacted version of the SAP.

The Minister properly sought advice from the Department before responding to the question. The Department recommended against providing the information to Parliament as the SAP was used in preparing its budget submission for consideration by Cabinet and should not be released. The Department’s advice to the Minister was brief, and did not contain analysis or explore options to provide parts of the information to Parliament.

The Department advised that it sought advice from the Department of Treasury before making its recommendation to the Minister but could not provide evidence of the discussions. The Department did not seek advice from the Department of the Premier and Cabinet or from the State Solicitor’s Office on the application of Cabinet-in-confidence (CIC).

While we accept that information which would reveal the deliberations and decisions of Cabinet is confidential, there should not be an assumption that all information associated with the SAP is also confidential. In this regard, we noted the following:
• An agency does not develop a SAP solely to seek funding in the budget. It is also developed to be an essential business planning tool\(^3\). In addition to identifying investment priorities and other information for Cabinet, the SAP contains general business planning information such as a stocktake of assets, which may not be considered by Cabinet.

• We reviewed the Department’s SAP and found multiple uses of public information. For example:
  
  - information on the number of students and a breakdown throughout the school system is available from the Department’s annual report and webpage
  
  - demographic information on housing and population is taken from public sources such as the Department of Planning’s Directions 2031\(^4\) and WA Tomorrow (2012)\(^5\) reports
  
  - some information on capital investment is available in the annual budget papers. For example, we identified total funding amounts for 3 new secondary schools in both the SAP and the 2014-15 Budget Papers.

The Department accepted Treasury’s advice based on existing protocols for the handling of SAPs. In our view, better practice would have been for the Department to analyse the content of the SAP and give the Minister options for providing Parliament with those parts that would not reveal Cabinet’s decisions or deliberations.

While we acknowledge the short time frames for consideration and response to questions without notice, the Minister could have requested additional time if needed.

On 8 December 2015, Parliament’s Estimates and Financial Operations Committee asked a similar question in a hearing with the Department. It requested any asset planning information that the Department could provide without breaching CIC. This is a clear indication that the committee recognises that some information in a SAP may be CIC.

However, the Department declined to provide any information. In my view, the decision not to provide any asset planning information to a parliamentary committee tasked with considering matters relating to the financial administration of the state\(^6\) was also not reasonable.

We recommend that:

1. The Department of Education enhance its procedures for addressing parliamentary questions to ensure that analysis and any expert advice is documented, and key details and options are included in its recommendation to the Minister.

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\(^3\) Department of Treasury: Strategic Asset Management Framework – Strategic Asset Plan, November 2013, p. 3.

\(^4\) Department of Planning, 2010. Directions 2031 and beyond: metropolitan planning beyond the horizon.

\(^5\) Department of Planning, 2012 Western Australia Tomorrow: population report 7 2006 to 2026.

\(^6\) Schedule 1 of the Legislative Council Standing Orders.
Response from the Department of Education

The Department considers that the Ministerial decision not to release the Strategic Asset Plan was reasonable given that Strategic Asset Plan was prepared to inform decisions by Cabinet and the Minister.

The Department has followed the protocols established by Treasury and the Department of the Premier and Cabinet in the management of the Strategic Asset Plan and notes that while the document contains information which is in the public domain it was not appropriate to release a document marked as Cabinet-in-Confidence even in a redacted form.

The Department however recognises the need for Parliament to be informed about the state, demand and performance of the Department's assets and is willing to work with Treasury to ensure relevant information is readily available to Parliament.
Ministerial decision not to provide a copy of the Department of Health’s Strategic Asset Plan to the Estimates and Financial Operations Committee

Opinion
The decision by the then Minister for Health, Minister Hames, not to provide Parliament with a copy of the Department of Health’s Strategic Asset Plan was not reasonable and therefore not appropriate. While some parts of Health’s Strategic Asset Plan would by their nature attract Cabinet confidentiality, other parts include some publicly available information of a factual and statistical nature and would appear suitable to be provided to Parliament.

Background
On 10 December 2015, as part of the 2014-15 Estimates and Financial Operations Committee annual report hearings, the Department of Health was asked by Hon Ken Travers MLC (supplementary question A21):

Strategic asset plan – why can it not be provided to the committee and also whether or not you have received any directions from anybody such as DPC not to provide it?

On 11 January 2016, the then Minister for Health, Minister Hames declined to provide the information, replying:

WA Health’s strategic asset plan (SAP) is considered part of the annual budget deliberation process and is therefore Cabinet-in-confidence.

On 22 February 2016, the Auditor General received the Minister’s notification 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 Department of Health’s (Department) strategic asset plan (SAP) was not reasonable and therefore not appropriate. I formed this opinion as the sole purpose of the SAP is not for consideration by Cabinet and some of the information it contains is publicly available. The Minister did not consider, for instance, if he could provide a redacted version of the SAP.

We note that the Minister’s answer did not address the second part of the question regarding any directions from another agency not to provide the SAP.

The Minister properly sought advice from the Department before responding to the request. The Department advised that the SAP was considered part of the budget deliberation process, and was Cabinet-in-confidence (CIC).

The Department also advised the Minister that the Department of Treasury had confirmed the SAP as part of the budget process. We acknowledge that the Department was following advice in a Treasury email that stated:

To uphold the security of your SAP, please ensure that the document is classified Cabinet-in-confidence. This is because the information in a SAP is considered as part of the annual budget process and is not released publicly.

The Department did not seek advice on the application of CIC from relevant experts, such as the Department of the Premier and Cabinet or the State Solicitor’s Office.
While we accept that information which would reveal the deliberations and decisions of Cabinet is confidential, there should not be an assumption that all information associated with the SAP is also confidential. In this regard, we noted the following:

- An agency develops and uses a SAP not solely to seek funding in the budget but also as an essential business planning tool. In addition to identifying investment priorities and other information for Cabinet, the SAP contains general business planning information such as a review of the number of services provided, which may not be considered by Cabinet.

- During the course of our examination, the Department was able to provide the results of an internal review of its SAP which identified that almost a quarter of the SAP is publicly available.

Although we have not confirmed the results of this review, we likewise found that the SAP contained considerable public information. These were primarily in sections of the report that established context or contained historical information but also in sections that detailed asset information. For example:

- sections that discuss demographic information and the number of services provided by the Department used public information sources such as the Australian Bureau of Statistics and the Health Clinical Services Framework.

- the list of programs funded by Royalty for Regions can be found in the 2014-15 annual budget papers

- information on the age of some hospital assets and closing dates of some facilities can be found on the internet.

It is our view that it was not appropriate to classify the entire SAP as CIC. The Department accepted Treasury’s advice based on existing protocols for the handling of SAPs. In our view, better practice would have been for the Department to analyse the content of the SAP and give the Minister options for providing Parliament with those parts that would not reveal Cabinet’s decisions or deliberations.

We recommend that:

1. The Department of Health enhance its procedures for addressing parliamentary questions to ensure that analysis and any expert advice is documented, and key details and options are included in its recommendation to the Minister.

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7 Department of Treasury: Strategic Asset Management Framework – Strategic Asset Plan, November 2013, p. 3.
9 For example, the age and location of Sir Charles Gairdner Hospital can be found at http://www.scgh.health.wa.gov.au/About_Us/ (accessed 17/06/2016).
Response from the Department of Health

The Department of Health does not support the Opinion. The Department remains firmly of the view that the Minister’s decision was reasonable and informed by expert advice received from the Department of Treasury as the relevant Central Agency and Policy owner in relation to this matter.

The Strategic Asset Plans (SAPs) are prepared for Treasury as part of the Budget process to inform decision making by the Economic and Expenditure Reform Committee (EERC) and Cabinet. Disclosure of the SAP would have resulted in Cabinet-in-Confidence Budget-related advice being made public and potentially set a precedent for release of other budget-related advice. Until such time as specific programs within a SAP have been considered and approved by Government as part of the annual budget process, they remain indicative and subject to ongoing refinement in the context of the Department’s service delivery planning process.

Information relating to programs within the SAP that have been considered and approved by Government is published in the Annual Budget Papers in the forward estimates for agencies, particularly approved capital works expenditure. In relation to these approved programs, there is little in the SAP that will add to the information already published and associated public announcements made by government.

It should also be noted that 10 year SAPs are subject to a wide variety of exigencies including but not limited to priorities of the government of the day; changes in circumstances; changes in technologies and external events.

The Department followed the proper procedures and sought expert input from the relevant central agency and policy owner prior to providing advice to the Minister. In these circumstances, the Department considers that the Recommendation is unreasonable and should be removed.

The Department will follow any changes made to policy by the Department of Treasury including guidelines on principles to assist the Department to determine what could be released (and not subject to Cabinet-in-Confidence) in future Strategic Asset Plans.
Ministerial decision not to provide information on the maintenance backlog of police facilities to the Estimates and Financial Operations Committee

Opinion

The decision by Minister Harvey not to provide Parliament with information about the dollar value of maintenance backlog for police facilities in 2014-15 by year was not reasonable and therefore not appropriate.

Background

On 7 December 2015, as part of the 2014-15 Estimates and Financial Operations Committee annual report hearings, Hon Ken Travers MLC, asked the Minister for Police for the following information (additional question 30):

What is the dollar value of maintenance backlog for police facilities in 2014/15 by year? E.g. 1 year behind, 2 years behind, 3 years behind.

On 13 January 2016, the Minister declined to give this information, replying:

This information is a component of the WA Police strategic asset plan, which is Cabinet-in-confidence and, therefore, not able to be released.

The Committee also asked:

How much of that work would be related to improving security at police facilities because of heightened security concerns?

The Minister gave this information, replying:

$68 million.

On 11 March 2016, the Auditor General received the Minister’s notification of her decision not to provide the information requested in additional question 30 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. We noted that the Minister drew upon a recommendation and advice from Western Australia Police (Police). However, this advice was not correct or complete.

The Minister properly sought advice from the Police before responding to the question. Police consulted with the Department of Treasury and the Department of the Premier and Cabinet before making its recommendation to the Minister.

Police recommended that the information not be provided to Parliament as it was part of the strategic asset plan (SAP) which Police believed was Cabinet-in-confidence (CIC). Police accepted Treasury’s advice based on existing protocols for the handling of SAPs. However, we note that the information sought was not contained in the SAP.
Police, in advising the Minister, provided limited analysis and did not consider all key facts. It did not consider:

- That the dollar value of the maintenance backlog in 2014-15 by year is not included in Police’s SAP, although we found that the SAP contained a statement referring to the previous year’s total estimated maintenance backlog. Police asserted that its response was in the overall context of discussion at the hearing that preceded the additional question 30. We confirmed from Hansard that the preceding discussion was about SAP and whether Police could provide a copy of its SAP. However, in keeping this context in mind, Police lost sight of the actual question asked which was about the dollar value of maintenance backlog.

- Whether the information would reveal the deliberations and decisions of Cabinet.

- If part or all of the information is publicly available, or readily available within Police or easily accessible by its staff. For example, some of the maintenance information is available in registers at each police facility.

- If the recommendation was inconsistent with another recommendation given to the Minister that she should provide related information sought in a separate request from Parliament. This separate request related to maintenance work required because of heightened security concerns.

We recommend that:

1. Police review and enhance its procedures for parliamentary questions to ensure that analysis and any expert advice is documented, and key details are included in its recommendation to the Minister.

Response from Western Australia Police

While it is noted that the supplementary question that the Section 82 notification related to was technically on the dollar value of the maintenance backlog, WA Police maintains that the context of the discussion leading to the question was solely around the release of the SAP, making the SAP and the supplementary question inextricably linked. Furthermore, as the department’s maintenance requirements, which are referred to in the SAP, are linked to the dollar value of any backlog, our recommendation to the Minister would likely be the same.

On this basis, we are of the view that an appropriate level of analysis and consideration of the key facts was conducted.

In relation to the views expressed concerning whether the SAP was Cabinet in confidence, WA Police has a limited role in assessing whether this is the case. That is a role of the Department of the Premier and Cabinet and the Treasury Department, from which WA Police sought advice.

Notwithstanding the above points, WA Police agrees to review its procedures in relation to parliamentary questions and requests for supplementary information.
Recommendations to the Department of Treasury and the Department of the Premier and Cabinet

Recommendations

We recommend that the Department of Treasury should:

1. By 30 November 2016, provide interim advice to agencies on options for releasing information from existing strategic asset plans (SAP) that would address the needs of Parliament while protecting Cabinet deliberations and decisions. This interim advice should include a set of principles to assist agencies in determining what could be released, including but not limited to SAP information that is:
   - publicly available including on government websites, such as state planning documents. For example, *State Planning Strategy 2050* and *Perth and Peel @3.5 million* plan
   - readily available to staff within the agency to use in performing their daily tasks
   - in published budget papers or annual financial statements including working papers and other documents used to prepare the budget and financial statements.

2. By 31 December 2017, review the model SAP it provides to agencies to clearly distinguish those parts of the plan that may contain Cabinet deliberations and decisions, and therefore are confidential.

We recommend that the Department of the Premier and Cabinet should:

1. By 30 November 2016, consider providing guidance to agencies on what information and documents would reveal Cabinet deliberations and decisions and therefore are confidential. This could involve updating the Cabinet Handbook.
Response from the Department of Treasury

The Auditor General has recognised that strategic asset plans (SAPs) are developed to inform Budget decisions by Ministers and Cabinet, and that elements of the Education, Health and Police SAPs that were sought for public release were Cabinet-in-confidence. In that context, the Department of Treasury is of the view that each Minister's decision not to provide their SAP was reasonable and consistent with advice provided by Treasury.

Thus far, SAPs have been treated as integrated documents comprising confidential material and some public information. The Auditor General has identified the opportunity to develop a new SAP approach that would apply to all agencies, including Government Trading Enterprises (GTEs), in order to distinguish between strategic planning information that is either confidential or publicly available.

The proposed approach will require careful consideration and approval by Cabinet; particularly to avoid the inadvertent release of material that is Cabinet-in-confidence or would undermine the financial interests of the State. Moreover, as indicated by the Department of the Premier and Cabinet, identifying and separating confidential information from agencies' SAPs will be a time consuming process that may add little value to material that is already available to the public.

Given the complexities involved and the need to seek Cabinet agreement, the provision of sound advice on the options for releasing SAP-related information may not be possible by 30 November 2016. Notwithstanding the above, the Department of Treasury will use best endeavours to meet the recommendations identified in the Report.

Response from the Department of the Premier and Cabinet

In response to the recommendation directed to this Department it is accepted and the Department intends to recommend to the Premier amendments to the Cabinet Handbook and possibly provide separate advice to agencies concerning the types of information and documents that may inform or reveal Cabinet deliberations, discussions or decisions or those of other executive bodies.

It is noted however that in the Department's opinion it is not possible to provide an exhaustive list of information or documents that may or may not inform or reveal Cabinet deliberations, discussions or decisions or those of other executive bodies. It is not possible to simply restrict this to information, data or documents that appear in a Cabinet submission or attachments, agenda or other meeting related documents. Cabinet deliberations, discussions and decisions are informed by a variety of data, information and documents at different stages of the Cabinet process that occur outside of individual meetings. Some material may be contained in a final Cabinet submission while others are retained for use by the Minister during discussions or are used to develop positions that may be accepted, rejected or simply discussed by Ministers in Cabinet or other Executive bodies. Legal precedent demonstrates that claims for public interest immunity on the grounds of cabinet consideration require an individual assessment of the data, information or documents in question and a blanket exemption or inclusion is not warranted.

This position is demonstrated in the example of Strategic Asset Plans. It is the Department's view that the agencies involved in this particular inquiry followed the correct procedure in identifying the plans as constituting part of the deliberations or decisions of Cabinet. The plans form an integral part of the Government's Budget process and the
detail contained in them informs Cabinet's Budget planning deliberations and decisions. The principle of not releasing cabinet related material is a long standing one and is central to Government, through the Cabinet process, being able to consider and make decisions about critical issues. It underpins the Westminster principle of Cabinet collective responsibility.

Your observations that some of the plans contained information available from other public sources and this information should have been released are noted. The Department is of the view that agencies should continue to consider the plans as cabinet in confidence and instead make alternative arrangements for providing that publically available information to Parliament or any others seeking access to the plans. The process of identifying and redacting non-public information in documents such as these plans is time consuming for agencies and ultimately pointless in terms of providing information to those seeking it. It is preferable to direct them to the publically available sources used in the plans or provide it directly to them. The Department will work with the Department of the Treasury to provide guidance to agencies around this issue in Strategic Asset Plans.
Appendix 1: Cabinet confidentiality

Cabinet confidentiality is a long established principle that aims to protect the deliberations and decisions of Cabinet. The practice of classifying Cabinet information in confidence comes from the Westminster system in the United Kingdom and does not stem from any legislation. It allows Cabinet Ministers to freely debate policies and agency proposals as part of government decision-making.

The classification of information as Cabinet-in-confidence (CIC) is not simple. While it is important that Cabinet information is kept in confidence; the principles of public interest, governmental transparency and parliamentary access to information are also vital.

There is limited guidance available for agencies for determining if information is subject to CIC. The Department of the Premier and Cabinet (DPC) is the Cabinet Secretariat and provides guidance to Western Australian agencies on Cabinet processes. The DPC Cabinet Handbook, designed to assist officers to understand the Cabinet process and prepare papers for submission to Cabinet, says:

*The confidentiality of Cabinet documents, discussions and decisions is a long established principle and has been regarded as essential for the maintenance of Cabinet collective responsibility.*

and that

*…Cabinet records includes Cabinet agendas, submissions, attachments to submissions, comment sheets and decisions.*

The DPC Cabinet Handbook does not provide guidance on whether CIC applies to documents prepared to help inform submissions.

The Commonwealth Cabinet Handbook and the New South Wales Department of Premier and Cabinet paper on cabinet conventions contain similar descriptions in their focus on Cabinet minutes, agendas, programmes, submissions and correspondence.

The Western Australian *Freedom of Information Act 1992* (FOI Act) details a number of government documents that are exempt from information requests from the public, as they would reveal the deliberations or decisions of an Executive body. The FOI Act also specifies that factual, statistical, scientific or technical information is not exempt unless it would reveal deliberations and decisions of an Executive body. While the FOI Act provides more examples than the DPC Cabinet Handbook, it does this for the purpose of assessing freedom of information requests, which differ in purpose from the opinion required from the Auditor General. It also does not contain a definitive list of documents which may fall under CIC.

While the majority of sources refer to types of documents, it is important to consider each on its merits. Previous advice we have received from the State Solicitor’s Office cites Australian case law which states that the immunity from disclosure of documents which can be considered Cabinet documents is not absolute.

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11 Department of the Premier and Cabinet, Cabinet Handbook 2013, p. 9.
12 Ibid. page 13.
13 Schedule 1, s.1.
14 Ibid. Schedule 1 – 1,(2).
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