

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 6: April 2017

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

Opinions on Ministerial Notifications

Report 6
April 2017



**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*.

This report deals with decisions by:

- the then Minister for Forestry, Hon Mia Davies MLA, not to provide Parliament with information about the current potential shortfall in pine resources by volume and value
- the then Attorney General, Hon Michael Mischin MLC, not to provide Parliament's Standing Committee on Estimates and Financial Operations with information about the billable hours for the Bell Group litigation proceedings.

I wish to acknowledge the cooperation of the staff at Forest Products Commission and the Department of the Attorney General.

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

COLIN MURPHY
AUDITOR GENERAL
13 April 2017

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 2 decisions by 2 Ministers not to provide information to Parliament. The decisions were made by:

- the then Minister for Forestry, Hon Mia Davies MLA, about the current potential shortfall in pine resources by volume and value
- the then Attorney General, Hon Michael Mischin MLC, about the billable hours for the Bell Group litigation proceedings.

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.

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.

While the investigations we conducted do not constitute an audit, our procedures follow the key principles in the Australian Auditing and Assurance Standards.

Ministerial decision not to provide the current potential shortfall in pine resources by volume and value

Opinion

The decision by the then Minister for Forestry not to provide Parliament with information about the current potential shortfall in pine resources by volume and value was reasonable and appropriate.

Background

Forest Products Commission (FPC) is a statutory authority that promotes the sustainable management and development of WA's forest products industry. FPC has contractual agreements to supply private companies with timber from native forests and plantations on land owned or leased by the State. The companies then create and sell various wood products.

During the Annual Report Hearings in October 2016, the Legislative Council Estimates and Financial Operations Committee sought additional information about a contingent liability included in the notes to FPC's 2016 Annual Financial Statements.¹ In the note, FPC explains that it has identified a potential shortfall in the pine resources available to meet its contracted supply commitments. The Committee asked for the following information:

As of today, what is the current potential shortfall of pine resources by volume and value?

On 22 November 2016, the Minister declined to give this information, replying:

In accordance with Section 82 Financial Management Act 2006, this information is commercial-in-confidence and unable to be disclosed.

On 29 November 2016, the Minister notified the Auditor General of her decision not to provide the requested information in accordance with section 82 of the FM Act.

Key findings

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

The Minister properly sought advice from FPC before responding to the request. FPC recommended to the Minister that she decline to provide the information as it was commercial-in-confidence.

In responding to the request for information, FPC sought advice from the State Solicitor's Office (SSO). FPC told us it had discussed the SSO advice with the Minister's office before finalising a proposed response.

FPC advised the Minister that releasing the requested information could adversely affect the interests of timber companies, and the State's legal position if the matter came to litigation.

FPC also advised the Minister that it could not reliably estimate the value because there is a high degree of uncertainty around the likelihood, timing and amount of the shortfall.

¹ Forest Products Commission 2015-16 Annual Report. Note 34: Contingent liabilities and contingent assets: page 98.

We used 2 criteria to assess the confidentiality of the information held by FPC. We found that the criteria were met and there are reasonable grounds for treating the information in confidence.

Criterion 1 – Is the information sufficiently secret? Is it significant?

We found the information to be secret and significant.

The quantity of any potential shortfall is not widely known and FPC is unable to provide a reliable estimate of the value. Although the contracted volumes of timber are present in State Agreements, we were unable to establish the potential shortfall using publicly sourced information.

During our review, FPC explained that it was not possible to reliably estimate the value of the potential shortfall as:

- contracts extend for up to 17 years and over this time future harvest yields and volumes will vary
- demand for timber is likely to fluctuate over this period and a lower level of demand could decrease the potential shortfall
- FPC has opportunities to supply other species and grades of timber in substitution.

We accept that these factors make calculating an estimate of the value of any potential shortfall unreliable.

We also concluded that the information is of significance to the State and the companies involved. SSO advised that publication of this information could be prejudicial to the State's legal position in the event of litigation. For the companies, there is a risk that the publication of any shortfall could affect confidence and create uncertainty about business continuity.

Criterion 2 – Is it in the public interest for the information to remain confidential?

We found that this criterion was met. In assessing this, we weighed the public interest² in releasing the information against the possible harm to the interests of the government or another party.

We agreed with FPC's view that its efforts to address any potential shortfall could be adversely affected if release of the information damaged market confidence. Accordingly, we consider that reasonable grounds exist for keeping the information confidential.

During the process of answering the question, FPC and the Minister's office discussed the option of releasing the information and requesting the Committee treat it in confidence. However, FPC advised us that it did not pursue this option due to the risks identified to the State and the companies involved. As we have noted in a previous Opinion,³ Legislative Council Standing Order 175 allows the Committee to order the disclosure or publication of evidence it had received in private.

Response from Forest Products Commission

The Forest Products Commission acknowledges and supports the findings of this report.

² Australian Law Reform Commission. March 2014 Serious Invasions of Privacy in the Digital Era – Meaning of public interest.

³ Office of the Auditor General 2014 Report 17: *Opinions on Ministerial Notifications*, page 7.

Ministerial decision not to provide the billable hours for the Bell Group litigation proceedings

Opinion

The decision by the then Attorney General not to provide information to the Parliament's Standing Committee on Estimates and Financial Operations was reasonable and appropriate.

The information requested was the billable hours for the Bell Group litigation proceedings.

Background

On 27 October 2016, during the Standing Committee on Estimates and Financial Operations 2015-16 Annual Report Hearing, the Attorney General was asked to provide information on the hours billed for the Bell Group litigation proceedings.

(a) With regards to the State Solicitor's Office, for the significant commercial claims ...what were the billable hours for the Bell Group litigation proceedings?

On 14 November 2016, the Attorney General declined to provide the information noting that:

the cost incurred, and the nature and extent of resources deployed, by the State in commercial/civil litigation may be of tactical significance to the decision-making of counter parties to that litigation.

He went on to say that he declined to provide the information 'until the case is concluded'.

On 25 November 2016, the Attorney General notified the Auditor General of his decision not to provide the requested information in accordance with section 82 of the FM Act.

Key findings

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

The Attorney General advised us that it is his policy not to release information about the resources the State has committed to an active matter. He has taken this position as he feels such information could be used against the State by its legal opponents.

In reaching this decision, the Attorney General informed us he had the benefit of advice from the State Solicitor. During our review we were not able to view this advice, as the Attorney General declined to waive legal professional privilege.

The Attorney General provided us with a detailed explanation of how the information could provide tactical advantage to the State's opponents in the litigation proceedings.

We assessed the Attorney General's decision using 2 criteria for the release of agency-generated information. We found that our criteria were met and there are reasonable grounds for treating the information in confidence.

Criterion 1 – Is the information sufficiently secret? Is it significant?

We were satisfied that the SSO's billable hours are secret and significant.

While we could find some information on the cost of litigation in agency financial statements, the SSO's billable hours could not be derived from public sources. We have also confirmed that it is not common legal practice to disclose such information while a matter is active.

The information is significant to the State because, as outlined below, it could provide a tactical advantage to the State's opponents in the active legal proceedings.

Criterion 2 – Is it in the public interest for the information to remain confidential?

This criterion was met. In assessing this, we weighed the public interest in releasing the information against the possible harm to the interests of the State, or another party.

In notifying Parliament of his decision not to provide the information, the Attorney General explained that the information is of 'tactical relevance and value' to the State's opponents in an active legal matter. During our review, the Attorney General advised us that the information could be used by the State's opponents to:

- gain insight into the State's commitment to the case. This could influence the opponent's decisions on how many resources they should commit. A knowledge of the State's current costs could also affect the potential outcomes of future mediation or negotiation
- generate public pressure for a resolution not in the State's interest. Opponents might use the information to influence media outlets and other stakeholders unfavourably about the use of State resources. This could result in political, media and public pressure in favour of a resolution more aligned with the interests of the State's opponents.

The Attorney General also identified that the State may seek to recover these costs if the litigation is successful, or they may be lost if it is not.

As the matter is still active, we concluded that the Attorney General's concerns were reasonable. During our review we noted that although the Attorney General declined to provide the information to Parliament, he did indicate that the information could be released once the litigation proceedings were concluded. Revealing the information once the proceedings have concluded would give transparency to this very important State litigation.

Auditor General's Reports

| Report number | 2017 Reports | Date tabled |
|---------------|---|---------------|
| 5 | Accuracy of WA Health's Activity Based Funding Data | 11 April 2017 |
| 4 | Controls Over Purchasing Cards | 11 April 2017 |
| 3 | Tender Processes and Contract Extensions | 11 April 2017 |
| 2 | Opinion on Ministerial Notification | 6 April 2017 |
| 1 | Opinion on Ministerial Notification | 30 March 2017 |

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