Opinions on Ministerial Notifications
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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 4 decisions by 3 Ministers not to provide information to Parliament:

- One decision by the Treasurer, the Hon Ben Wyatt MLA, not to provide information to Parliament about which current Members of Parliament are members of the Parliamentary Pension Scheme administered by the Government Employees Superannuation Board.

- Two decisions by the Minister for Corrective Services, the Hon Francis Logan MLA, not to provide information to Parliament about the business case and cost savings from converting the Wandoo Reintegration Facility into a women’s drug and alcohol rehabilitation facility operated by the State.

- One decision by the Minister for Tourism, the Hon Paul Papalia MLA, not to provide information to Parliament about the amount of funding provided for the Margaret River Gourmet Escape in 2017.

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AUDITOR GENERAL
11 April 2018
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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 4 decisions by 3 Ministers not to provide information to Parliament:

- One decision by the Treasurer, the Hon Ben Wyatt MLA, not to provide information to Parliament about which current Members of Parliament are members of the Parliamentary Pension Scheme (PPS) administered by the Government Employees Superannuation Board (GESB).

- Two decisions by the Minister for Corrective Services, the Hon Francis Logan MLA, not to provide information to Parliament about the cost savings from converting the Wandoo Reintegration Facility into a women’s drug and alcohol rehabilitation facility operated by the State.

- One decision by the Minister for Tourism, the Hon Paul Papalia MLA, not to provide information to Parliament about the amount of funding provided for the Margaret River Gourmet Escape in 2017.

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 (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 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 not to provide information about members of the PPS to Parliament

Opinion

The decision by the Treasurer not to provide Parliament with information about which current Members of Parliament are members of the PPS was reasonable and appropriate.

Background

In Parliament on 24 August 2017, the Hon Martin Aldridge MLC asked the Treasurer for information about current Members of Parliament who are beneficiaries of the PPS:

I refer to the Minister’s answer to question on notice No. 20, answered on 28 June 2017, and I ask again:

(a) which current Members of Parliament currently enjoy membership of the Parliamentary Pension Scheme; and

(b) if it is the Minister’s intention to not provide the information I seek, when does the Minister intend to fulfil his obligations under section 82 of the Financial Management Act 2006?

On 31 October 2017, the Treasurer declined to give this information, replying:

(a) The information requested is confidential.

(b) I am advised that section 82 does not apply in this case – but in the interests of due process I will give Notice during the next sitting.

On 1 November 2017, the Treasurer tabled notices in both houses of Parliament in accordance with section 82 of the FM Act. On 3 November 2017, the Treasurer notified the Auditor General of his decision in accordance with the FM Act.

Key findings

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

The Treasurer properly sought advice from GESB before responding to the request. GESB advised the Treasurer that it would not provide the names of current members of the PPS. GESB sought legal advice before advising the Treasurer.

We assessed the information against two key criteria. Specifically:

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

This criterion was met. There is a high level of transparency around remuneration and benefits for Members of Parliament (MPs), including eligibility for membership of the PPS. However, at the time the Treasurer declined to provide the information, publicly available information could not be used to confirm which pension scheme or superannuation fund MPs belonged to.

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

This criterion was met. We assessed the potential benefits and detriments of disclosure and determined that the public interest and the interests of PPS members is likely best served by keeping member names confidential, at least until members authorise any disclosure. While
we acknowledge the public interest in the remuneration and other benefits that MPs are entitled to, there already is a high level of transparency around actual benefits paid to MPs. Disclosure of individual PPS membership information would be inconsistent with GESB’s Privacy Policy, which is aligned to the Australian Privacy Principles set out in the Commonwealth Privacy Act 1988. GESB’s Privacy Policy prohibits the disclosure of personal information unless required by law or for the administration of the funds.
Ministerial decisions not to provide information about Wandoo Reintegration Facility to Parliament

Opinion

The decisions by the Minister for Corrective Services not to provide the information requested by Parliament on the cost savings from converting the Wandoo Reintegration Facility were not reasonable and therefore not appropriate.

Background

In Parliament on 6 September 2017, Mr Peter Katsambanis MLA asked the Minister for Corrective Services the following questions without notice:

398. I refer to the minister’s announcement that the Wandoo Reintegration Facility will be converted to a drug and alcohol rehabilitation facility and that its operations will be returned to the public service, which will, and I quote what the minister said “save taxpayers’ dollars”.

(1) How much specifically will the government save by removing up to 80 male prisoners from Wandoo and turning the facility into a women’s rehabilitation facility?

(2) Will the minister table the business case showing the total savings that will result from returning the operation of Wandoo to the public service?

399. I have a supplementary question. On what basis can the minister claim that he will save taxpayer dollars when he does not have a business case to back up his claim and when the Office of the Inspector of Custodial Services said that Wandoo is a model of best practice and should be used as an example at other prisons?

On 6 September 2017, the Minister declined to give the information requested, replying:

398. (1-2) I thank the member very much indeed for the question. Obviously, the member took a lot of notice of the answer I provided to a previous question on Wandoo. This information is commercially confidential.

399. Given that Serco has an extension on its contract for a further six months, I will not be providing the member with that information because it is commercially confidential.

On 20 October 2017, we were notified of the Minister’s decisions not to provide the requested information in accordance with section 82 of the FM Act.

An opinion under section 24 of the AG Act is not provided in relation to the Minister’s decision about the business case showing the total savings that will result from returning the operation of Wandoo to the public service. This is because the business case did not exist at the time the Minister was asked to provide it to Parliament, therefore there could be no refusal to provide it. The Minister advised Parliament on 20 September 2017 that there was no business case.

Key findings

The decisions by the Minister not to provide the cost savings information were not reasonable and therefore not appropriate.
The Minister declined to provide the information to Parliament on the basis of it being commercially confidential. The questions were asked without notice. The Minister did not seek advice from the Department of Justice before responding to the request.

We assessed the cost savings information using key criteria for commercial confidentiality.

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

This criterion was met. We found the cost savings information was not generally known or ascertainable at the time the Minister declined to provide the information. Publicly available information could not be used to determine the expected savings to Government.

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

This criterion was not met. We found the cost savings information was unlikely to reveal confidential commercial Government or third party information. While the cost savings from converting the Wandoo Reintegration Facility would likely consider financial and other elements of the current Serco Australia Pty Ltd contract to run Wandoo, much of the Serco contract information is already publicly available. As such, the Minister’s decisions not to provide the information for reasons of commercial confidentiality were not reasonable and therefore not appropriate.

During our inquiry, the Minister informed us that the cost savings information could not have been provided to Parliament as it was prepared for, and considered by, Cabinet in July 2017, and therefore protected by public interest immunity. However, we did not assess the cost savings information against Cabinet-in-confidence (CIC) considerations, as public interest immunity was not the reason given by the Minister in his written notice to Parliament. Rather, we assessed the commercial confidentiality of the information, as that was the reason stated by the Minister when he declined to provide it.

We have previously reported that the submission of information to Cabinet does not of itself mean it is protected by CIC\(^1\). Our assessments of whether information is protected are often complex and require significant resources to determine where the information is held, who is aware of it and whether any part could be provided without compromising CIC. Also, there is limited and sometimes conflicting guidance available.

While we acknowledge the short time frames for consideration and response to questions without notice, if needed, Ministers can request additional time in which to answer the questions.

\(^1\) Auditor General’s report 18 of 2016, *Opinion on Ministerial Notifications.*
Ministerial decision not to provide information about funding provided for the Margaret River Gourmet Escape in 2017 to Parliament

Opinion

The decision by the Minister for Tourism not to provide Parliament with information on the amount of funding provided for the Margaret River Gourmet Escape in 2017 was reasonable and appropriate.

Background

On 16 October 2017, as part of the 2017-18 Estimates and Financial Operations Committee budget estimates hearings, Hon. Dr Steve Thomas MLC asked for the following information:

Noting the nearly $40 million budget for event tourism and given that the Gourmet Escape in Margaret River is due to begin on 17 November, has a decision been made on whether to provide funding for that event? If a decision has been made, can we get the level of funding that has been provided; or, if funding has been declined, or if no decision has been made at this point, given the short time frame, can I ask when a decision will be made?

On 3 November 2017, the Minister for Tourism wrote to the Committee advising that he would not provide the information requested on the amount of funding, replying:

Yes, funding for the 2017 Margaret River Gourmet Escape is committed. A decision for the 2018 event will be made at around the time of this year’s event.

The amount of funding for the 2017 Margaret River Gourmet Escape is considered commercially sensitive.

On 8 November 2017, the Auditor General received notification of the Minister’s 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 did not seek advice from the Department of Jobs, Tourism, Science and Innovation (Department) before responding to the request. However, the Department subsequently provided advice to the Minister on 7 November 2017, confirming the Minister’s decision that the information was commercially sensitive and should not be provided to Parliament. We have reminded the Department and the Minister’s office that it is good practice for agencies to provide a documented assessment prior to Ministers declining to provide information to Parliament.

The Department’s advice was based on an assessment against its Policy and Guidelines: Release of Event Sponsorship and/or other Commercial Information. As we have found previously, this document provides suitable criteria for assessing if information is commercially sensitive.

The Department concluded that the funding information had a commercial value and its release could compromise the ability to successfully attract, develop, retain, or negotiate for the event in the future, causing commercial harm to the State.
The Minister’s decision and the Department’s conclusion were sound, based on the following:

- the 2017 event funding was not generally known
- the highly competitive nature of the global events market
- the event could become more expensive to secure and retain if other destinations knew how much the WA government was willing to pay
- other jurisdictions could gain an unfair advantage by using knowledge of the sponsorship amount to outbid WA for the event or negotiate with the event holder for a similar event outside of WA
- the Department was considering funding arrangements for future events at the time.

In our view, the Minister’s decision not to disclose the information is consistent with the public interest of protecting and reducing the risk of damage to the financial and commercial affairs of the State.
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