

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 14: February 2019

Office of the Auditor General Western Australia

7th Floor Albert Facey House
469 Wellington Street, Perth

Mail to:

Perth BC, PO Box 8489
PERTH WA 6849

T: 08 6557 7500

F: 08 6557 7600

E: info@audit.wa.gov.au

W: www.audit.wa.gov.au

National Relay Service TTY: 13 36 77
(to assist people with hearing and voice impairment)

We can deliver this report in an alternative format for those with visual impairment.

© 2019 Office of the Auditor General Western Australia. All rights reserved. This material may be reproduced in whole or in part provided the source is acknowledged.

WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

Opinions on Ministerial Notifications

Report 14
February 2019



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

Opinions on Ministerial Notifications

This report has been prepared for Parliament under the provisions of section 24 of the *Auditor General Act 2006*.

This report deals with 4 decisions by the Minister for Transport, the Hon Rita Saffioti MLA, not to provide information to Parliament about:

- the *Taxi User Subsidy Scheme Review* report
- minutes of the METRONET Taskforce meeting held on 27 February 2018
- the Harriet Point Agreement and information about its primary effect
- advice from the State Solicitors Office about changes to the Harvest Mass Management Scheme.

A handwritten signature in black ink, appearing to read "Caroline Spencer".

CAROLINE SPENCER
AUDITOR GENERAL
13 February 2019

Contents

- Ministerial decisions not to provide information to Parliament 4
 - Introduction 4
 - What did we do? 4
- Ministerial decision not to provide the *Taxi User Subsidy Scheme Review* report to Parliament 5
 - Opinion..... 5
 - Background 5
 - Key findings..... 5
- Ministerial decision not to provide the February 2018 METRONET Taskforce minutes to Parliament 7
 - Opinion..... 7
 - Background 7
 - Key findings..... 7
- Ministerial decision not to provide a copy of the Harriet Point Agreement and information about its primary effect to Parliament..... 10
 - Opinion.....10
 - Background10
 - Key findings.....10
 - Response from the Pilbara Ports Authority13
- Ministerial decision not to provide advice from the SSO about changes to the Harvest Mass Management Scheme to Parliament..... 14
 - Opinion.....14
 - Background14
 - Key findings.....15

Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 4 decisions by the Minister for Transport, the Hon Rita Saffioti MLA, not to provide information to Parliament about:

- the *Taxi User Subsidy Scheme Review* report
- minutes of the METRONET Taskforce meeting held on 27 February 2018
- the Harriet Point Agreement and information about its primary effect
- advice from the State Solicitors Office (SSO) about changes to the Harvest Mass Management Scheme.

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 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 not to provide the *Taxi User Subsidy Scheme Review* report to Parliament

Opinion

The decision by the Minister for Transport, the Hon Rita Saffioti MLA, not to provide Parliament with the *Taxi User Subsidy Scheme (TUSS) Review* report was not reasonable and therefore not appropriate as parts of the report were not Cabinet-in-confidence and could have been provided.

Background

On 15 February 2018, as part of the 2016-17 Estimates and Financial Operations Committee (Committee) Annual Report Hearings, the Hon Aaron Stonehouse MLC, asked the Minister representing the Minister for Transport for the following information (Supplementary Information A1):

A1. Can you please provide a copy of the Taxi Subsidy Scheme Review report?

On 15 March 2018, the Minister declined to provide the information, replying:

This document is subject to Cabinet deliberations and is therefore Cabinet-in-confidence.

On 12 April 2018, the Auditor General received the Minister's notification of the 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 *TUSS Review* report was not reasonable and therefore not appropriate.

The Minister properly sought advice from the Department of Transport (Department) before responding to the request. The Department recommended the report be provided to the Committee with a private status. The Minister did not follow this recommendation. Instead, the Minister declined to provide the report to the Committee stating it was subject to Cabinet deliberations and was therefore Cabinet-in-confidence.

In considering the Minister's decision, we followed the approach laid out in previous *Opinions on Ministerial Notifications* dealing with Cabinet confidentiality, the core principle of which is to protect information that would reveal deliberations and decisions of Cabinet.¹ We assessed the requested information against the following Cabinet confidentiality considerations:

Is part or all of the information publicly available?

A small amount of 'overview' information contained in the report was already publicly available on the Department's website at the time the Minister declined to provide it to the Committee.

We also found the report had been circulated by the Department, with limited confidentiality provisions:

- internally

¹ Office of the Auditor General. 2016 Report 18: [Opinions on Ministerial Notifications](#), p.19

- with government transport agencies in 2 other states
- with a private financial services organisation to assist with implementation.

The Department circulated the report based on its understanding that the report would be made public. This understanding was consistent with initial tender documents for the review which stated the report, or parts of it, would likely be released publicly once completed. The report was completed in July 2017, but the Department only became aware the report was to be submitted to Cabinet 8 months later.

The Department did not consider, or treat the report as Cabinet-in-confidence in accordance with the 'need to know' principle outlined in the Department of the Premier and Cabinet's *Cabinet Handbook*.² This is also evident from the Department's recommendation that the report be provided to the Committee, none of whom are Cabinet members.

Does the information contain material that would reveal the deliberations and decisions of Cabinet?

We viewed the submission that went to Cabinet and found that discrete information in the report could likely reveal the deliberations of Cabinet. The report was submitted to Cabinet on 17 July 2018, 4 months after the Minister declined to provide it.

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?

The report was written with the understanding that parts would be made public. It was not created for the purpose of informing Cabinet or being discussed in Cabinet, nor does it include policy options or recommendations prepared for submission to Cabinet. We found the Department had already implemented some of the report's recommendations prior to it being submitted to Cabinet. However, some parts of the report may be used to make future recommendations to Cabinet.

Did the Minister consider providing any sections of the information that would not reveal deliberations and decisions of Cabinet?

The Minister did not consider providing Parliament with those parts of the report that were already publicly available or would not reveal future deliberations or decisions of Cabinet.

Determining whether information is Cabinet-in-confidence is not straight forward. It is good practice for Ministers, their offices and agencies to document an assessment of the component parts of a requested document prior to Ministers declining to provide information to Parliament.

In our view, the report could have been provided to Parliament, at the time it was requested, with the discrete amount of Cabinet-in-confidence information redacted.

During the inquiry, the Minister advised that she had not ruled out future release of the report. On 29 November 2018, the Minister tabled a copy of the *TUSS Review* report in Parliament.

² Department of Premier and Cabinet. 2017. [Cabinet Handbook](#), p.11

Ministerial decision not to provide the February 2018 METRONET Taskforce minutes to Parliament

Opinion

The decision by the Minister for Transport, the Hon Rita Saffioti MLA, not to provide Parliament with minutes of the METRONET Taskforce meeting held on 27 February 2018 was not reasonable and therefore not appropriate as parts of the minutes were not Cabinet-in-confidence and could have been provided.

Background

In Parliament on 22 March 2018, the Hon Peter Collier MLC asked the Leader of the Government in the Legislative Council, representing the Minister for Transport, for the following information in Question without Notice 120:

I refer to the Metronet task force chaired by the Minister for Transport; Planning; Lands and the meeting on 27 February.

- (1) Was the issue of tunnel borer Grace ceasing boring discussed at that meeting?*
- (2) Were minutes of the meeting taken?*
- (3) If yes to (2), will the minister table those minutes; and, if not, why not?*

On 22 March 2018, the Leader of Government in the Legislative Council, on behalf of the Minister, answered part (1) and (2). However, the Minister declined to give the information requested in part (3), replying:

Again, I thank the Leader of the Opposition for some notice of the question.

- (1) No.*
- (2) Yes.*
- (3) The minutes are Cabinet-in-confidence.*

On 12 April 2018, the Auditor General received the Minister's notification of the 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 not reasonable and therefore not appropriate.

The Minister properly sought advice from the Department of Transport (Department) before responding to the request. The Department recommended that the Minister decline to provide the information to Parliament because the minutes are Cabinet-in-confidence. The Minister followed the Department's advice.

In considering the Minister's decision, we followed the approach laid out in previous Opinions on Ministerial Notifications dealing with Cabinet confidentiality, the core principle of Cabinet confidentiality is to protect information that would reveal deliberations and decisions of

Cabinet.³ We assessed the requested information against the following Cabinet confidentiality considerations:

Is part or all of the information publicly available?

We found a small amount of the information in the 27 February 2018 minutes in publicly available sources at the time the Minister declined to provide it.

We also found the Department did not treat the minutes as Cabinet-in-confidence in accordance with the 'need to know' principle outlined in the Department of the Premier and Cabinet's *Cabinet Handbook*.⁴ The minutes did not have restricted access controls applied and were easily accessible at the METRONET office. We have reminded the Department that access to Cabinet information should be restricted.

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?

The minutes were not created solely for the purpose of informing Cabinet or being discussed in Cabinet. They serve a dual purpose. The first is to capture discussions and outcomes of the February METRONET Taskforce meeting. The second is to inform Cabinet on the planning and delivery of the METRONET program.

The Minister regularly reports to Cabinet about the progress of METRONET. We found only a discrete amount of the information in the minutes is likely to be used to support policy options and recommendations to Cabinet.

Does the information contain material that would reveal the deliberations and decisions of Cabinet?

We reviewed the minutes and found only a discrete amount of the information contained in them would likely reveal the deliberations and decisions of Cabinet.

Did the Minister consider providing any sections of the information that would not reveal deliberations and decisions of Cabinet?

The Minister did not consider providing Parliament with those parts of the minutes that were already publicly available or would not reveal deliberations or decisions of Cabinet. Determining whether information is Cabinet-in-confidence is not straight forward. It is good practice for Ministers, their offices and agencies to document an assessment of the component parts of a requested document prior to Ministers declining to provide information to Parliament.

In our view, the minutes could have been provided to Parliament with the discrete amount of Cabinet-in-confidence information redacted.

During the inquiry, the Minister advised us that in her view we did not need to canvass broader issues of Cabinet confidentiality as:

- the narrow purpose of the particular request for the METRONET minutes was to confirm that they did not contain any material relevant to the use of a boring machine
- the requested minutes did not contain such information
- she had accurately informed Parliament that they did not.

³ Office of the Auditor General. 2016 Report 18: [Opinions on Ministerial Notifications](#), p.19

⁴ Department of Premier and Cabinet. 2017. [Cabinet Handbook](#), p.11

We disagree as a discrete part of the question specifically requested the minutes. This was the basis of the section 82 notice tabled by the Minister in Parliament and our assessment.

Ministerial decision not to provide a copy of the Harriet Point Agreement and information about its primary effect to Parliament

Opinion

The decision by the Minister for Transport not to provide Parliament with a copy of the Harriet Point Agreement and information about its primary effect was reasonable and therefore appropriate. However, Pilbara Ports Authority did not document an assessment of the primary effect of the Agreement or how non-disclosure of the information was in the public interest, or advise the Minister of the option to provide Parliament with the limited information that could be disclosed.

Background

In Parliament on 13 March 2018, the Hon Martin Aldridge MLC asked the Minister for Transport, for the following information in Question on Notice 894:

I refer to the Harriet Point Agreement, and I ask:

- (a) Who are the parties to the agreement;*
- (b) When was the agreement executed;*
- (c) What is the primary effect of the agreement; and*
- (d) will the Minister please provide a copy of the agreement?*

On 10 April 2018, the Leader of Government in the Legislative Council, on behalf of the Minister, provided the information requested in parts (a) and (b) and declined to provide the information requested in parts (c) and (d), replying:

- (a) Parties to the agreement are BHP and the Port of Port Hedland (now the Pilbara Ports Authority)*
- (b) The agreement was signed in August 2008*
- (c)-(d) As stated by the then Treasurer in the Legislative Assembly on 24 February 2016, “the Harriet Point agreement between the port of Port Hedland and BHP is confidential”*

On 12 June 2018, 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 for Transport not to provide:

- information on the primary effect of the Harriet Point Agreement (Agreement) was reasonable and therefore appropriate
- a copy of the Agreement was reasonable and therefore appropriate.

The Minister properly sought advice from the Department of Transport (Department) before responding to the request. The Department in turn sought advice from the Pilbara Ports Authority, the Authority responsible for managing the Agreement, before advising the Minister.

The Department recommended the Minister not provide the primary effect and a copy of the Agreement because the Agreement is confidential. The Minister followed the Department's advice.

The Minister's section 82 notice further advised that the information could not be provided to Parliament because it was commercially sensitive, and disclosure could result in detriment to the State in the form of liability from a breach of contractual obligations as well as reputational damage.

Before providing advice to the Minister, the Department and Pilbara Ports Authority did not document an assessment of the primary effect of the Agreement or how non-disclosure of the information was in the public interest. They also did not consider providing Parliament with the limited information that could be disclosed. It is good practice to assess and document the confidentiality of the information prior to declining to provide it.

We assessed the information using our key criteria for commercial confidentiality as outlined in our Audit Practice Statement.⁵ Specifically:

- Criterion 1 – the information should be sufficiently secret.
- Criterion 2 – the confidential information must be specifically identified.
- Criterion 3 – disclosure would cause unreasonable detriment to the owner of the information. Disclosure would not be in the public interest.
- Criterion 4 – the information was provided on the understanding that it would remain confidential.

The primary effect of the Harriet Point Agreement

We found the decision by the Minister for Transport not to provide Parliament with information about the primary effect of the Agreement was reasonable and therefore appropriate.

Criterion 1 was met. At the time of the Minister's decision, information on the primary effect of the Agreement was not generally known or ascertainable from publicly confirmed sources.

Criteria 2 and 4 were met. Most of the information in the Agreement is specifically identified as confidential. The primary effect of the Agreement is multi-faceted and cannot be fully and comprehensively disclosed to Parliament due to the confidentiality restrictions in the Agreement.

We found that part of the primary effect, the existence of the process referred to in clause 7.6 of the Agreement, can be disclosed without breaching confidentiality. We consider that disclosing the existence of this process would not provide the entire primary effect of the Agreement.

Criterion 3 was met. We assessed the potential benefits and detriments of disclosing the primary effect and found that the commercial interests of the State were likely best served by keeping the primary effect confidential as disclosure would breach the explicit confidentiality requirements of the Agreement.

A copy of the Harriet Point Agreement

We found the decision by the Minister for Transport not to provide Parliament with a copy of the Agreement was reasonable and therefore appropriate.

⁵ Office of the Auditor General. [2018 Audit Practice Statement](#), pp.17-19

Criterion 1 was met. At the time of the Minister's decision, information in the Agreement was not generally known or ascertainable from publicly confirmed sources. We found little information about the Agreement has been made public in the 10 years since it was signed, other than the existence of the Agreement. In answering other parts of the Parliamentary question, the Minister advised that the Agreement was signed in August 2008 and the parties to the Agreement were BHP and the Port of Port Hedland (now the Pilbara Ports Authority).

Criteria 2 and 4 were met. We found that most of the information in the Agreement is specifically identified as confidential and that an obligation of confidence exists. The Agreement has been entered into on the written understanding it would remain confidential. We assessed if the Agreement could have been provided with confidential parts redacted and found that the Agreement could not meaningfully be provided with the confidential information redacted.

Criterion 3 was met. We assessed the potential benefits and detriments of disclosing the Agreement and found that the commercial interests of the State were likely best served by keeping the Agreement confidential as disclosure would breach the explicit confidentiality requirements of the Agreement.

Transparency and accountability must be fundamental considerations in agreements between the State and other parties. Section 81 of the FM Act does not allow government to enter into contractual or other arrangements in such a way as to impose confidentiality from Parliament.⁶ The *Freedom of Information Act 1992* supports transparency and accountability by providing a general right of access to State and local government documents. Access to information is in the public interest because it allows the Parliament and the public to understand and debate potential financial and non-financial benefits, detriments and other impacts to the State of government decisions.

Where confidentiality is assessed as being in the State's best interest, it is good practice for governments to document the reasons and to establish a maximum timeframe for preserving confidentiality. Agreements should be periodically reviewed and include assessment of whether confidentiality remains in the State's best interest, or if disclosure is more appropriate.

⁶ See also Report 62 – Standing Committee on Estimates and Financial Operations – [Provision of Information to the Parliament – May 2016](#), pp.55-57

Response from the Pilbara Ports Authority

Pilbara Ports Authority (PPA) agrees with the Auditor General's key findings that the decision by the Minister for Transport not to provide to Parliament:

- Information on the primary effect of the Harriet Point Agreement (Agreement) was reasonable and therefore appropriate; and
- A copy of the Agreement was reasonable and therefore appropriate

PPA will continue to review its procedures relating to Parliamentary requests for information, to ensure that the Parliament is kept appropriately informed in all matters regarding the PPA.

Ministerial decision not to provide advice from the SSO about changes to the Harvest Mass Management Scheme to Parliament

Opinion

The decision by the Minister for Transport, the Hon Rita Saffioti MLA, not to provide Parliament with advice from the SSO about changes to the Harvest Mass Management Scheme (HMMS) was reasonable and therefore appropriate.

Background

In Parliament on 9 May 2018, the Hon Colin De Grussa MLC asked the Minister representing the Minister for Transport for the following information in Question without Notice 326:

I refer to the decision by Main Roads WA to change the harvest mass management scheme pilot requirements.

- (1) Will the Minister table advice from the State Solicitor's Office outlining the need to institute changes to the HMMS to reduce risk to the state?*
- (2) Does the change include grain movements outside the harvest period?*
- (3) If yes to (2), from what date will the changes to the HMMS apply and how often will it be reviewed?*
- (4) What consultation with industry was undertaken by Main Roads WA or the minister's office prior to the making of this decision?*
- (5) Will the minister consider a compromise to the changes in order to satisfy advice from the State Solicitor's Office?*

On 9 May 2018, the Minister representing the Minister for Transport provided the information in (2) to (5) and declined to provide the information requested in (1), replying:

I thank the honourable member for some notice of the question.

- (1) The advice is subject to legal professional privilege*
- (2) No*
- (3) Not applicable*
- (4) A final position on the harvest mass management scheme access requirements has not yet been reached. The proposal has recently been provided to some sectors of the industry. Consultation is ongoing, with a view to introducing some changes to the HMMS prior to the forthcoming harvest.*
- (5) Any changes to the HMMS access requirements will need to fully consider the advice from the State Solicitor's Office, particularly with regard to road safety.*

On 12 June 2018, the Minister notified the Auditor General of the decision not to provide the requested information in accordance with section 82 of the FM Act.

The Minister properly sought advice from Main Roads Western Australia (Main Roads) before responding to the request. Main Roads recommended the Minister decline to provide the information to Parliament because the advice was subject to legal professional privilege.

In considering the Minister's decision, we followed the approaches laid out in our previous Opinions on Ministerial Notifications dealing with legal professional privilege.⁷

For legal professional 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 client's draft correspondence'.

Key findings

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

We asked the Attorney General for permission to examine the SSO advice so we could confirm its existence and privileged status. The Attorney General advised it is the State's long held view that the Auditor General does not currently have the authority to view legal advice under the AG Act. In his view, releasing legal advice to the Auditor General could waive the State's claim of legal professional privilege.

The SSO provided us with confirmations and heavily redacted information, reiterating the claim of legal professional privilege. Based on this evidence we were satisfied that the legal advice requested in Parliament existed and is subject to legal professional privilege.

The Auditor General has previously expressed a view that the AG Act should be amended to allow this Office to examine legal advice as a primary source of evidence to save time, effort and resources.

⁷ Office of the Auditor General. 2016 Report 10: [Opinions on Ministerial Notifications](#), p.19

Auditor General's Reports

| Report number | Reports | Date tabled |
|---------------|---|------------------|
| 13 | Opinion on Ministerial Notification | 23 January 2019 |
| 12 | Managing Disruptive Behaviour in Public Housing | 20 December 2018 |
| 11 | Opinions on Ministerial Notifications | 20 December 2018 |
| 10 | Opinions on Ministerial Notifications | 18 December 2018 |
| 9 | Treatment Services for People with Methamphetamine Dependence | 18 December 2018 |
| 8 | Opinions on Ministerial Notifications | 10 December 2018 |
| 7 | Audit Results Report – Annual 2017-18 Financial Audits of State Government Entities | 8 November 2018 |
| 6 | Opinion on Ministerial Notification | 31 October 2018 |
| 5 | Local Government Procurement | 11 October 2018 |
| 4 | Opinions on Ministerial Notifications | 30 August 2018 |
| 3 | Implementation of the GovNext-ICT Program | 30 August 2018 |
| 2 | Young People Leaving Care | 22 August 2018 |
| 1 | Information Systems Audit Report 2018 | 21 August 2018 |

Office of the Auditor General
Western Australia

7th Floor Albert Facey House
469 Wellington Street, Perth

Mail to:
Perth BC, PO Box 8489
PERTH WA 6849

T: 08 6557 7500

F: 08 6557 7600

E: info@audit.wa.gov.au

W: www.audit.wa.gov.au



Follow us on Twitter [@OAG_WA](https://twitter.com/OAG_WA)



Download QR Code Scanner app and scan code to access more information about our Office