

Western Australian Auditor General's Report



Opinion on Ministerial Notification



Report 27: June 2018-19

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The Office of the Auditor General acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past and present.

WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

Opinion on Ministerial Notification

Report 27
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**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

Opinion on Ministerial Notification

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

It deals with a decision by the Attorney General, the Hon John Quigley MLA, not to provide information to Parliament about an email from the Executive Director, Courts and Tribunal Services, regarding consultation on the Historical Homosexual Convictions Expungement Bill 2017.

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

CAROLINE SPENCER
AUDITOR GENERAL
20 June 2019

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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the Attorney General, the Hon John Quigley MLA, not to provide information to Parliament about an email from the Executive Director, Courts and Tribunal Services, regarding consultation on the Historical Homosexual Convictions Expungement Bill 2017 (Bill).

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 entity documents
- a review of any advice provided to the relevant Minister by entities, the State Solicitor's Office (SSO) or other legal advisers
- interviews with key entity 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.

Disclaimer of Opinion

I have been unable to obtain sufficient appropriate evidence on the Attorney General's decision not to provide requested information to Parliament. Accordingly, I am unable to form an opinion on whether his decision was reasonable and therefore appropriate.

The Department of Justice (Department) and the SSO have both declined my requests to view a copy of the email requested in the parliamentary question and I therefore have insufficient information on which to base an opinion.

The email requested in the parliamentary question was crucial evidence to our inquiry. My inability to view it meant that I was unable to form an independent opinion about the claim of public interest immunity. Appendix 1 provides background on this issue.

The inability of an auditor to access the information they need to meet their obligation is a serious matter for the auditor and for those who rely on their opinion. In the event that an auditor is unable to obtain sufficient appropriate audit evidence, auditors have few options. One of these is to issue a Disclaimer of Opinion. This is the third occasion where my Office has been placed in this position for an opinion on a section 82 notice.

Background

On 21 and 22 August 2018, during consideration of the Bill in the Legislative Council, the Minister representing the Attorney General, was asked questions about clause 5 that makes the CEO the decision-maker on applications for convictions to be expunged. The Minister explained that the heads of jurisdiction¹, Director of Public Prosecutions, Solicitor General, Western Australia Police Force, Commissioner for Victims of Crime, as well as a number of other stakeholders, were consulted and a departmental email confirmed support for the CEO being the decision-maker.

On 22 August 2018, the Hon Nick Goiran MLC, asked the Leader of the Government in the Legislative Council:

Can we have a copy of that email that was provided by the executive director of courts and tribunals sometime between 4 and 7 September 2017?

On 22 August 2018, the Leader of the Government in the Legislative Council declined to give this information, replying:

...I have indicated that the government will not be releasing the written documentation of the consultation.

On 18 October 2018, the Auditor General received notification from the Attorney General in accordance with section 82 of the FM Act, advising of his decision not to provide the requested information.

Key findings

The Attorney General sought advice from the Department before responding to the parliamentary question. The Department told us that it advised the Attorney General not to provide the requested information and that this was based on advice from the SSO that the information was subject to public interest immunity.

The Attorney General's notice to us stated that the requested email formed part of a consultation process on a draft enactment and that its disclosure to Parliament would prejudice the proper workings of government.

We asked the Department to see the requested email. The Department declined our request, citing SSO advice that it is subject to public interest immunity. We asked the Department to see its advice to the Attorney General and the SSO advice it received. The Department declined our request and referred us to the SSO.

We wrote to the SSO requesting a copy of the email, or to view it. Our request was declined as, in the SSO's view, allowing us to view the email would be inconsistent with the document's public interest immunity status. Instead, the SSO offered to provide some other evidence to confirm the existence of the requested email and its subject matter.

However, our inability to view the email in its entirety limits the scope of our work. Without access to it we cannot assess if the information it contains is inherently confidential (sufficiently secret and significant), and whether it is in the public interest for the information to remain confidential.

I note Clause 6, in Schedule 1 of the *Freedom of Information Act 1992*, which exempts the release of information that may reveal a deliberative process of government, a Minister or an agency. This includes opinions, advice or recommendations, consultations or deliberations.

¹Chiefs of the Supreme, District and Magistrates Courts and the presidents of the Children's Court and the State Administrative Tribunal. Western Australia, *Hansard*, Legislative Council, 22 August 2018, 1, (Sue Ellery, Leader of the House).

However, this exemption is not automatic and does not apply if the information is merely factual or statistical in nature, or if the public interest outweighs the reasons for withholding it.

The Australian Auditing and Assurance Standards, which we comply with when conducting our audits and investigations requires auditors to have sufficient appropriate evidence on which to base an opinion. I am therefore unable to form an independent opinion on the reasonableness and appropriateness of the Attorney General's claim of public interest immunity without an assessment of the email's content.

Response from the Department of Justice

The Department of Justice notes the disclaimer of opinion issued by the Auditor General. That disclaimer was issued on the basis that the Auditor General was not given full access to the information (contained in an email) that had been sought in Parliament. As the Auditor General has referenced in Appendix 1, the *Auditor General Act 2006* does not, by its terms, abrogate either legal professional privilege or public interest immunity.

The effect of this is that if the Attorney General provides the Auditor General with a document that is subject to either legal professional privilege or public interest immunity (which includes Cabinet confidentiality), he will, as a matter of law, be taken to have voluntarily disclosed the document to a third party. Significantly, this adversely impacts on the maintenance of claims to privilege and immunity in respect of that information in other contexts.

The Department notes the Auditor General's position that the provision of these documents to her is consistent with the spirit of the legislation. The spirit of the legislation cannot be determined without regard to the express wording of the legislation and the legal reality that creates. The express words of the *Auditor General Act 2006* do not provide for documents subject to legal professional privilege or public interest immunity to be capable of compulsion by the Auditor General. In the context of that statutory framework, there can be no argument that the spirit of the legislation requires something different.

Nonetheless, in the spirit of cooperation, in every instance, including this one, the Department, the Attorney General and his portfolio agencies endeavour to work with the Auditor General to find a solution which enables the Auditor General to have sufficient information to carry out her functions despite the absence of a statutory power on her part to compel the provision of documents subject to public interest immunity (or legal professional privilege).

In this instance, notwithstanding that the Attorney General, through the State Solicitor's Office, expressed that same willingness to work towards a solution that properly balanced the role of the Auditor General with the importance of maintaining fundamental common law privileges, the Auditor General formed the view that only a complete copy of the document in question would suffice for her purposes.

Appendix 1: Access to information and public interest immunity

It is a professional requirement for auditors to have access to information they consider necessary to perform their duties. In the absence of such access, auditors have few options. One of these is to issue a Disclaimer of Opinion.

I was compelled to issue a Disclaimer of Opinion for the notice mentioned in this report because the Department, acting on the SSO's advice, and the SSO declined to provide me with access to the email requested in Parliament. In the SSO's view, releasing the email to us or allowing us to view it would be inconsistent with the document's public interest immunity status.

During this inquiry, the SSO offered to provide some evidence to confirm the existence of the requested email and its subject matter. This is consistent with our previous opinions concerning information subject to legal professional privilege, where we have relied on sufficient and appropriate evidence from the SSO to confirm the existence and subject matter of those documents.

However, we are unable to rely on the SSO's confirmation that the email exists nor some evidence of its contents to form an opinion in this current matter. Access to the email in question is required to independently assess the claim of public interest immunity and form an opinion.

Previous SSO advice provided to this Office is that section 36(2) of the AG Act provides the Auditor General with powers to obtain documents derived from written law. The SSO's view is that public interest immunity, like legal professional privilege, are common law doctrines and do not fall within the definition of what constitutes a written law.

My Office must be able to examine documents subject to public interest immunity and legal professional privilege, while at the same time protecting the status of the documents. I consider that my access to such documents is entirely consistent with the spirit and intent of the AG Act.

However, advice the SSO has previously provided to me is that Parliament's intent as evidenced by the Explanatory Memorandum that accompanied the Auditor General Bill was not achieved by the AG Act and hence the Act would need amending to give that authority.

I continue to seek every opportunity to communicate the importance of amending the AG Act in this regard. Following the 2016 review of the operation and effectiveness of the AG Act by the Joint Standing Committee on Audit, I am confident this matter has support across Government and the Parliament to finally progress to a real and sensible resolution.

Auditor General's Reports

Report number	Reports	Date tabled
26	Opinions on Ministerial Notifications	19 June 2019
25	PathWest Laboratory Information System Replacement Project	19 June 2019
24	Verifying Employee Identity and Credentials	19 June 2019
23	Improving Aboriginal Children's Ear Health	12 June 2019
22	Opinions on Ministerial Notifications	5 June 2019
21	Engaging Consultants to Provide Strategic Advice	5 June 2019
20	Information Systems Audit Report 2019	15 May 2019
19	Audit Results Report – Annual 2018 Financial Audits	15 May 2019
18	Firearm Controls	15 May 2019
17	Records Management in Local Government	9 April 2019
16	Management of Supplier Master Files	7 March 2019
15	Audit Results Report Annual 2017-18 Financial Audits of Local Government Entities	7 March 2019
14	Opinions on Ministerial Notifications	13 February 2019
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

Report number	Reports	Date tabled
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

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