

Western Australian Auditor General's Report



Opinion on Ministerial Notification



Report 14: 2019-20

31 January 2020

**Office of the Auditor General
Western Australia**

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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 14: 2019-20
January 2020



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINION ON MINISTERIAL NOTIFICATION

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

It deals with a decision by the Minister for Education and Training, the Hon Sue Ellery MLC, not to provide Parliament with the business case for the new TAFE student management system.

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

CAROLINE SPENCER
AUDITOR GENERAL
31 January 2020

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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the Minister for Education and Training, the Hon Sue Ellery MLC, not to provide Parliament with the business case for the new TAFE student management system.

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.

It is our longstanding approach to enquire into only those decisions not to provide information to Parliament that are raised in the Minister's written notice. It would be onerous and impractical for us to identify and report on all other Ministerial decisions not to provide information to Parliament. When we do become aware that a Minister has decided not to provide information to Parliament, we may write to them reminding them of their obligations under section 82 of the FM Act.

What we did

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.

Opinion

The decision by the Minister for Education and Training, the Hon Sue Ellery MLC, not to provide Parliament with the business case for the new TAFE student management system was not reasonable and therefore not appropriate.

In particular, it is not reasonable that the Minister did not attempt to seek consent from the Leader of the Opposition to obtain the document, a Cabinet record of the previous government, to assess if any of the information could be released.

Background

In Parliament on 21 August 2018, the Hon Alison Xamon MLC asked the Minister for Education and Training for the following information in Question without Notice 627:

I refer to the new TAFE student management system.

- (1) Was a business case for this new system completed?*
- (2) If no to (1), why not?*
- (3) If yes to (1), will the minister please table the business case?*
- (4) If not to (3), why not?*

On 21 August 2018, the Minister provided a response:

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

- (1) Yes.*
- (2) Not applicable.*
- (3) Not at this time.*
- (4) The approval to proceed with the student management system was considered as part of the 2015-16 budget process. Legal advice is being sought about whether the associated business case can be released.*

On 12 September 2018, the Minister provided supplementary information regarding part (4) of the question, declining to provide the business case:

I have some further information for Hon Alison Xamon on question without notice 627 asked on 21 August that I undertook to provide for her in respect of part (4) of that question. The department has now advised me that the student management system business case was prepared as a cabinet-in-confidence document of the previous government and I am unable to table the business case in Parliament as it is subject to the public interest immunity. The department has sought appropriate advice before reaching this view. I should also note I have not reviewed the business case myself, as it is a cabinet record of the former government. In accordance with cabinet conventions, as set out in the Cabinet Handbook, I am not able to obtain that document without the consent of the Leader of the Opposition. Accordingly, I am now preparing a section 82 notice under the Financial Management Act 2006 advising of my inability to table the documents to be submitted to both houses of Parliament and the Auditor General.

On 28 September 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.

Key findings

The decision by the Minister not to provide the information requested in part 3 was not reasonable and therefore not appropriate.

The Minister properly sought advice from the Department of Training and Workforce Development (the Department) before responding to the request. In advising the Minister, the Department sought legal advice from the SSO. The Department provided us with a copy of its advice to the Minister with advice the Department received from the SSO redacted¹.

The Minister's section 82 notice stated that the business case was a Cabinet record of the previous government.

Our inquiry confirmed this was the case. In accordance with the Department of the Premier and Cabinet's *Cabinet Handbook* 'Protocols for Auditor General access', we requested from the Cabinet Secretariat, and were granted access to, the business case submitted to the then Economic and Expenditure Reform Committee (EERC). The business case was developed for submission to the EERC, and includes options and recommendations. It was considered by EERC in October 2014, and approved during the 2015-16 budget process.

Our inquiry found that a small amount of information in the business case was publicly available, on the internet and in government budget papers at the time the Minister declined to provide the business case to Parliament. This includes the background and reasons for the new system, and total project costs. The Department did not advise the Minister that some information could have been provided to the Parliament as it was not subject to Cabinet confidentiality.

Access protocols to Cabinet documents of a previous government

Section 6.2(b) of the *Cabinet Handbook*² sets out conventions for access to Cabinet documents of a previous government:

Under long standing convention it is understood that Cabinet documents are considered confidential to the government that created them. Where ongoing administration requires access to the Cabinet documents of a previous government, it is generally subject to the consent of the current leader of the party that created the records whilst in office.

However, the Minister did not attempt to follow the conventions, stating in her section 82 notice that 'I saw no utility in seeking that consent from the Leader of the Opposition as I was not intending to table the document and I otherwise did not require it'.

Parliamentary questions as a primary means of accessing information

We acknowledge there may be practical implications when requesting information from the leader of a previous government, as evidenced in a previous opinion of our Office³. In that opinion it was reasonable and appropriate for the Minister not to provide information to Parliament as the Minister made a request but was not granted access to the information by the Leader of the Opposition.

¹ The SSO declined our request to see the redacted parts of the Department's advice to the Minister, advising that this would waive legal professional privilege. The SSO has advised us previously it is the State's long held view that the Auditor General does not currently have the authority to view legal advice under the *Auditor General Act 2006* without waiving privilege. The Auditor General's view on legal professional privilege and access to information has been outlined previously. [Western Australian Auditor General's Report, *Opinion on Ministerial Notifications*. Report 6: October 2018-19, [p. 7](#).]

² Department of Premier and Cabinet. 2017. *Cabinet Handbook*, [p.15](#)

³ Western Australian Auditor General's Report, *Opinions on Ministerial Notifications*. Report 22: June 2018-19, [p. 6](#)

Although there was the possibility in the current case that the Leader of the Opposition could refuse access to the information, the possibility of refusal did not, in our view, remove the inherent expectation that accountable Ministers would follow the convention outlined within the *Cabinet Handbook* in an attempt to seek access to relevant information when responding to a question in Parliament.

In considering the Minister's decision, we were mindful of the important role that parliamentary questions have as one of only a few means by which members of Parliament can access information about government policy and activities. Parliamentary questions are considered 'important ways to examine the Government's administration; (...) by providing a forum for the public's interests and concerns to be presented and debated by their elected representatives'⁴.

The Ministerial code of conduct sets out the accountabilities and responsibilities of a Minister. It states that 'Ministers are accountable to both the community and Parliament for the administration of their departments, authorities and statutes. Ministers should be as open as possible and give reasons for their decisions and actions to ensure they are working in the public interest'⁵. In a similar vein, the principle of the disclosure of information in the public interest was at the heart of why sections 81 and 82 of the FM Act were introduced.

⁴ About Parliament – Sheet 01 *The Constitution and Roles of Parliament*, [p. 2](#)

⁵ Government of Western Australia, *Ministerial Code of Conduct 2017*, [p. 3](#)

Response from Minister Ellery

I cannot accept the view expressed by the Auditor General that not to provide Parliament with the business case for the new TAFE student management system was not reasonable (and therefore not appropriate).

In my view, the Auditor General is in grave error to expect Ministers to seek the Cabinet records of previous Government(s) sought by Members of Parliament, edit those documents and then table them in Parliament.

The Cabinet records of a previous Government are (quite properly) not accessible by myself, my Office or my Cabinet colleagues. There are procedures in place, both as a matter of convention and statute, by which they can be sought.

As a matter of experience, consent to access the Cabinet records of previous Governments is only granted, quite properly, where there is a clear and present need for the Government of the day to have those documents (such as where they are subject to subpoena).

Moreover, if I had obtained a copy of the Cabinet document requested, I would not have tabled the document in any event because it contained Cabinet material, as the Auditor General acknowledges.

However, the Auditor General would also seem to suggest that I take it upon myself to edit the Cabinet records of a previous Government and provide information in such a record that might already be publicly accessible. That suggestion is inconsistent with the public interest immunity which attaches to Cabinet records in their entirety and is, perhaps obviously, not a step that I would be willing to take.

I have asked for this response to be included in the Summary of Findings so my Parliamentary colleagues can properly understand my refusal to agree with the assertions of the Auditor General as to what is "reasonable" on this point, lest it be adopted as the right and proper course of any Minister (be it within this Government or another), contrary to the public interest which public interest immunity in Cabinet records exists to protect.

Auditor General's comments on the Minister's response

The provision of information to Parliament is fundamental to principles of good governance, openness and accountability in our Westminster system of parliamentary democracy. The Parliament of Western Australia considers these principles so important, that beyond the conventions and protocols of Parliament, it legislated safeguards in sections 81 and 82 of the FM Act and corresponding provisions under section 24 of the AG Act ('the section 82 function') to promote the disclosure of information in the public interest.

In the current case, there were 2 opportunities for the Minister to provide, or seek to provide, information to Parliament which were not utilised. In the first instance, the Department of Training and Workforce Development did not advise the Minister that a small amount of information related to the background and reasons for the new system, and total project costs was publicly available. This publicly available information could have been provided to the Parliament, even though the business case itself was subject to Cabinet confidentiality.

The second opportunity was for the Minister to seek access to the Cabinet documents of the previous government and, if granted, examine those documents to discern what information could be provided to Parliament that did not reveal the deliberations or decisions of Cabinet.

As stated on page 5, my Office acknowledges there may be practical implications for an accountable Minister when requesting information from a previous government. In these circumstances, although there is a possibility that access to the information may be refused, or redaction within documents may be necessary before they can be provided to the Parliament, this does not, in my opinion, remove the expectation that a Minister would seek access in accordance with established conventions in order to reply to a parliamentary question.

Indeed, I recently examined a notice where access was sought from a previous government and refused. I formed an opinion in that case that the Minister's decision was reasonable and appropriate⁶. In that situation the Minister demonstrated a sufficient attempt to meet parliamentary accountability requirements by utilising established conventions.

In relation to the Minister's response in the current case regarding personally editing Cabinet records, this is clearly not my expectation, nor would it be appropriate. However, I would expect that public sector entities and other Ministerial advisers properly assess and consider the information in Cabinet and other records to provide robust advice on what can be tabled in Parliament, with appropriate redaction in the public interest.

I recognise that Ministers, their advisers and others may hold a different view to mine. In seeking to serve the public interest and the Parliament, I provide my opinion, and its basis, in this report to the Parliament under the provisions of my Act. Further explanation and precedent around the section 82 function are provided in my previous reports and those of my predecessor⁷, and in the Office's [Audit Practice Statement](#).

In addition, the relevant legislative provisions and parliamentary conventions and other principles, among other matters, were examined in the Legislative Council's Standing Committee on Estimates and Financial Operations Report 62, [Provision of Information to the Parliament](#) of May 2016. The parliamentary report provides further relevant context on the Parliament's view and its expectations in relation to the section 82 function.

⁶ Opinion on Ministerial Notification, [Report 22](#), June 2018-19, p. 5.

⁷ See: OAG, *Opinion on Ministerial Notification*, Report 18, 11 August 2016, [Appendix 1: Cabinet confidentiality](#);

OAG, *Opinion on Ministerial Notification*, [Report 21](#), 6 October 2016;

OAG, *Opinion on Ministerial Notification*, Report 6, 31 October 2018-19, [Appendix 1: Auditor General's view on legal professional privilege and access to information](#).

For other relevant references, refer to: Legal opinion by Mr Bret Walker SC on the [Construction and interpretation of the Financial Management Act 2006 section 82 and the Auditor General Act 2006 section 24\(2\)\(c\)](#), January 2015;

State Solicitor's [response](#) to the Mr Bret Walker SC legal opinion on the construction and interpretation of the *Financial Management Act 2006* section 82 and the *Auditor General Act 2006* section 24(2)(c) November 2015;

Standing Committee on Estimates and Financial Operations, Report 62: [Provision of Information to the Parliament](#), May 2016, chaired by the Hon Ken Travers;

Joint Standing Committee on Audit, Report 7: [Review of the Operation and Effectiveness of the Auditor General Act 2006](#), August 2016;

State Solicitor's Office, Guidelines to Ministers Deciding Whether to Provide Information to Parliament, November 2016.

Auditor General's reports

Report number	2019-20 reports	Date tabled
13	Fee-setting by the Department of Primary Industries and Regional Development and Western Australia Police Force	4 December 2019
12	Audit Results Report – Annual 2018-19 Financial Audits of State Government Entities	14 November 2019
11	Opinion on Ministerial Notification	30 October 2019
10	Working with Children Checks – Follow-up	23 October 2019
9	An Analysis of the Department of Health's Data Relating to State-Managed Adult Mental Health Services from 2013 to 2017	9 October 2019
8	Opinions on Ministerial Notifications	8 October 2019
7	Opinion on Ministerial Notification	26 September 2019
6	Opinions on Ministerial Notifications	18 September 2019
5	Fraud Prevention in Local Government	15 August 2019
4	Access to State-Managed Adult Mental Health Services	14 August 2019
3	Delivering Western Australia's Ambulance Services – Follow-up Audit	31 July 2019
2	Opinion on Ministerial Notification	26 July 2019
1	Opinions on Ministerial Notifications	19 July 2019

**Office of the Auditor General
Western Australia**

7th Floor Albert Facey House
469 Wellington Street, Perth

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

 @OAG_WA

 Office of the Auditor General for
Western Australia