

Western Australian Auditor General's Report



Opinions on Ministerial Notifications – Policing Information



Report 20: 2020-21

28 April 2021

**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.

**Opinions on Ministerial Notifications –
Policing Information**



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINIONS ON MINISTERIAL NOTIFICATIONS – POLICING INFORMATION

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 3 decisions by the former Minister for Police, the Hon Michelle Roberts MLA, not to provide information to Parliament in relation to the following Legislative Council Questions on Notice:

- 2753 – the requested information was a copy of the Mobile Phone Offences Options Paper
- 2816 – the requested information was a copy of the submission made by the Commissioner of Police to the Director of Liquor Licensing, regarding the imposition of liquor restrictions in the Kimberley
- 2846 – the requested information was the Western Australia Police Force assessment of crime trends based on prejudice towards the diverse sexuality and gender community and an executive briefing note.

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

CAROLINE SPENCER
AUDITOR GENERAL
28 April 2021

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 3 decisions by the former Minister for Police, the Hon Michelle Roberts MLA, not to provide information to Parliament in relation to the following Legislative Council Questions on Notice:

- 2753 – the requested information was a copy of the Mobile Phone Offences Options Paper
- 2816 – the requested information was a copy of the submission made by the Commissioner of Police to the Director of Liquor Licensing, regarding the imposition of liquor restrictions in the Kimberley
- 2846 – the requested information was the Western Australia Police Force assessment of crime trends based on prejudice towards the diverse sexuality and gender community and an executive briefing note.

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* requires the Auditor General to provide an opinion to Parliament as to whether the Minister's decision was reasonable and appropriate.

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 State Government 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.

Ministerial decision not to provide a copy of the Mobile Phone Offences Options Paper to Parliament

Opinion

The decision by the former Minister for Police; Road Safety, the Hon Michelle Roberts MLA, not to provide Parliament with the Mobile Phone Offences Options Paper (options paper) was reasonable and therefore appropriate.

The options paper was prepared for submission to Cabinet and its release would reveal Cabinet deliberations.

Background

In Parliament on 11 February 2020, the Hon Martin Aldridge MLC asked the then Minister for Police for a copy of the options paper. Legislative Council Question on Notice 2753 asked:

I refer to the Road Traffic Code 2000 Review of Penalties 2019 released in September 2019, and I ask:

- (a) has the Minister reviewed the report;*
- (b) what is the government's response to the report's recommendation;*
- (c) if a government response is not yet complete, when can one be expected; and*
- (d) I note on page 48 of the report a reference to a 'Mobile Phone Offence Options Paper', and I ask that this paper be tabled?*

On 18 March 2020, the then Minister declined to provide a copy of the options paper, replying:

- (a) Yes.*
- (b)-(c) The recommendations will be considered and actioned if appropriate. There are no plans to change penalties for speeding offences.*
- (d) I am advised that the paper is subject to public interest immunity and cannot be tabled at this time.*

On 6 May 2020, the Auditor General received the then Minister's notification in accordance with section 82 of the FM Act of the decision not to provide the options paper as it was a Cabinet document.

Key findings

The decision by the then Minister not to provide Parliament with the options paper was reasonable and therefore appropriate.

The then Minister did not seek advice from the Road Safety Commission, the entity responsible for the options paper. Instead, the then Minister's office prepared a briefing note which recommended that the then Minister not provide the options paper to Parliament as it was a Cabinet document. The then Minister's office sought advice from the Department of the Premier and Cabinet and the SSO before responding to the request. The SSO declined our request to see the advice because, in the SSO's view, releasing the advice could waive legal professional privilege. However, we were able to obtain other evidence on which to base an opinion.

In considering the then Minister's decision, we followed the approach set out in previous opinions on ministerial notifications dealing with Cabinet confidentiality.¹ We assessed the requested information against the following Cabinet confidentiality considerations:

Is part or all of the information publicly available?

We viewed the submission that went to Cabinet and found that the options and recommendations included in the options paper were not publicly available. While there was some introductory and background information which was publicly available, it was necessary information to support the Cabinet submission and deliberations.

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 options paper was prepared by the Road Safety Commission for the purpose of informing Cabinet and included proposed legislative reforms and recommendations to Cabinet for addressing increased mobile phone use while driving.

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

The options paper included options and recommendations for proposed reform and could 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 briefing note and recommendation to the then Minister considered whether an appropriately redacted copy of the options paper could be provided to Parliament. In our view, we agree that all information contained in the options paper supported Cabinet deliberations to identify a course of proposed reform.

The then Minister's notice to the Auditor General also stated that the options paper may be subject to legal professional privilege because it includes information which could constitute instructions to Parliamentary Counsel or legal advisors. However, there was no evidence to suggest that it was prepared for the dominant purpose of giving legal advice or in connection to existing or anticipated legislation. As such, we did not assess the options paper on this basis.

¹ Office of the Auditor General. [Opinions on Ministerial Notifications](#), Report 18 (2016) pp.5-6

Ministerial decision not to provide a copy of the submission made by the Commissioner of Police regarding Kimberley liquor restrictions to Parliament

Opinion

The decision by the former Minister for Police, the Hon Michelle Roberts MLA, not to provide Parliament with a submission from the Commissioner of Police to the Director of Liquor Licensing regarding the imposition of liquor restrictions in the Kimberley was reasonable and therefore appropriate.

Background

In Parliament on 18 February 2020, the Hon Alison Xamon MLC, Member for the North Metropolitan Region, asked the then Minister for Police in Legislative Council Question on Notice 2816, for information about the imposition of liquor restrictions in the Kimberley. The question was:

I refer to recent media reporting regarding liquor restrictions, and I ask:

- (a) will the Minister please table a copy of the submission made by the Commissioner for Police, to the Director of Liquor and Gaming, regarding the imposition of liquor restrictions in the Kimberley; and*
- (b) if no to (a), why not?*

On 1 April 2020 the then Minister declined to give this information, replying:

- (a)-(b) The Western Australian Police Force advise the Director of Liquor Licensing² is conducting an investigation pursuant to section 64 of the Liquor Control Act 1988 on the basis of the submissions. As such, the WA Police Force advise tabling the submission may be injurious to the investigation and further that the Commissioner has a duty to protect the confidentiality of the process, protect the identity and evidence of those stakeholders who contributed to the submissions and maintain the integrity of the investigation.*

On 2 April 2020, the Auditor General received the then Minister's notification of her decision not to provide the requested information in accordance with section 82 of the FM Act.

Key findings

The decision by the then Minister not to provide the submission from the Commissioner of Police to the Director of Liquor Licensing (the Director) regarding the imposition of liquor restrictions in the Kimberley (the submission) was reasonable and therefore appropriate.

The then Minister properly sought advice from the Western Australia Police Force (WA Police Force) before responding to the request. WA Police Force recommended that the Minister should decline to provide the information to protect the integrity of the Director's

² As per the *Liquor Control Act 1988*, the Director of Liquor Licensing is the Director General of the Department of Local Government, Sport and Cultural Industries.

investigation and the identity of stakeholders that contributed to the submission. The then Minister followed the advice provided by WA Police Force.

We found that the majority of information in the submission contained individual statements of evidence provided to the State Intelligence and Command Division of WA Police Force and supporting advice and recommendations regarding liquor restrictions in the Kimberley. The submission in its entirety is not publicly available and has not been previously released.

However, around a quarter of the submission information was either statistical or factual in nature or already publicly available. This included information published in the media, academic literature, previous decisions and determinations of the Director, Commonwealth and State Government action plans, and the 2019 findings of the State Coroner's inquest into the deaths of 13 children and young people. In our view, such information is not subject to public interest immunity as its disclosure could not prejudice the investigation.

The then Minister's notice to Parliament stated, and we confirmed, that an investigation pursuant to section 64 of the *Liquor Control Act 1988* was current at the time of the Minister's decision and that disclosure of the submission may be injurious to the Director's investigation.

The public release of the submission in its entirety, or in part, could prejudice this investigation and reveal confidential information of individuals and organisations that was provided as evidence to the WA Police Force. Disclosure of the submission would also result in the release of information prepared by the State Intelligence and Command Division and compromise the operations of WA Police Force.

We found in this instance the confidentiality of the information contained in the submission outweighs the benefits of disclosure, and agree it is in the public interest for the information to remain confidential.

However, we believe that the portion of information in the submission that is not subject to public interest immunity could be released.

Ministerial decision not to provide a copy of an assessment about crime trends based on prejudice towards the diverse sexuality and gender community and a briefing note in full to Parliament

Opinion

The decision by the former Minister for Police, the Hon Michelle Roberts MLA, not to provide Parliament with the WA Police Force assessment of crime trends based on prejudice towards the diverse sexuality and gender community (part (a) of the question) and to provide a redacted copy of the briefing note (parts (c)-(d) of the question), was, on balance, reasonable and therefore appropriate.

Background

In Parliament on 10 March 2020, the Hon Alison Xamon MLC, Member for the North Metropolitan Region asked the then Minister for Police, in Legislative Council Question on Notice 2846, for information about hate crimes. The question was:

I refer to work undertaken by West Australian Police about hate crimes, and I ask, will the Minister please table the following documents:

- (a) “Western Australia Police Force assessment of crime trends based on prejudice towards the diverse sexuality and gender community”;*
- (b) “LGBTIQ+ Community Crime and Safety Survey”;*
- (c) Executive Briefing notes regarding the above survey (final/latest draft);*
- (d) Executive Briefing notes that capture evaluation of the intelligence assessment (final/latest draft); and*
- (e) if no to any of (a), (b), (c) or (d), why not?*

On 12 May 2020, the then Minister declined to give the information requested in (a) and gave redacted information for (c)-(d), replying:

- (a) No.*
- (b) Yes. Please see tabled paper [3852]*
- (c)-(d) A draft agency briefing note is tabled with some redactions. Please see tabled paper [3852]*
- (e) The Intelligence Assessment, as referred to in (a), and redacted portions of the draft Agency briefing note, contain intelligence information. The State Solicitor’s Office has advised that this information is properly subject to public interest immunity, on the basis that the public interest favours that intelligence information is kept confidential so as to not adversely affect the investigations conducted by law enforcement agencies. In line with that advice, this information is not tabled.*

On 15 May 2020, the Auditor General received the then 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 then Minister not to provide the WA Police Force assessment of crime trends based on prejudice towards the diverse sexuality and gender community (assessment) and to provide a redacted copy of the briefing note was, on balance, reasonable and therefore appropriate.

The then Minister properly sought advice from the WA Police Force before responding to the request. Following legal advice from the SSO, WA Police Force advised the then Minister not to table the assessment and portions of the briefing note as they contained intelligence information.

The then Minister's response to the parliamentary question was consistent with WA Police Force advice.

We assessed the assessment and the redacted portions of the briefing note against our criteria for public interest immunity:

- *Is the information inherently confidential: Is it sufficiently secret? Is it significant?*
- *Is it in the public interest for the information to remain confidential?*

Assessment

We found the assessment is classified as protected in line with the Federal Government's *Protective Security Policy Framework*.³ This framework applies a protected security classification to information because its release would be expected to cause damage to the national interest, individuals or organisations. The assessment is identified as protected information under the framework, as the potential impact from disclosure would compromise crime prevention or disrupt the intelligence operations of WA Police Force.

For this reason, we found that the confidentiality of matters considered in the assessment outweigh the benefits of disclosure, and it is in the public interest for the information to remain confidential.

Redacted portions of the briefing note

The briefing note summarises information from the assessment to inform discussion and provide recommendations to the then Minister to reduce barriers for people of diverse sexuality and gender in accessing police services.

The then Minister tabled the majority of the briefing note. For the information that was redacted, we found several sections which were appropriately redacted because they would reveal the results of the assessment.

However, WA Police Force did not assess whether the redacted information in the briefing note was publicly available prior to providing advice to the then Minister. Consequently, we found instances where the information redacted was generally known or publicly available. This included information that was left unredacted in the remainder of the briefing note and information previously published in Hansard and the media. As this information was already public, it could not prejudice law enforcement and would not be subject to the public interest immunity.

³ Australia Government, Department of the Attorney-General, *Protective Security Policy Framework*, Commonwealth of Australia, 2020.

On balance, we are of the view that it was reasonable and therefore appropriate for the then Minister to provide a redacted document given the confidentiality of the information in the assessment.

However, when preparing advice to Ministers, it is good practice for entities to clearly document their advice including which information should be withheld and the reasons why.

Response from Western Australia Police Force

We note the finding of your office that the decision by the Minister for Police for each of these questions was reasonable and therefore appropriate.

The comments in the draft report have been noted by the Western Australian Police Force and will be considered when advising the Minister for Police in future.

Auditor General's 2021-22 reports

Number	Title	Date tabled
19	Opinion on Ministerial Notification – Bennett Brook Disability Justice Centre	8 April 2021
18	Regulation of Consumer Food Safety by the Department of Health	1 April 2021
17	Department of Communities' Administration of Family and Domestic Violence Support Services	11 March 2021
16	Application Controls Audits 2021	8 March 2021
15	Opinions on Ministerial Notifications – Tax and Funding Information Relating to Racing and Wagering Western Australia	26 February 2021
14	Opinion on Ministerial Notification – Hotel Perth Campaign Reports	24 February 2021
13	Opinion on Ministerial Notification – Release of Schedule of Stumpage Rates	24 February 2021
12	Grants Administration	28 January 2021
11	COVID-19 Relief Fund	21 December 2020
10	COVID-19: Status of WA Public Testing Systems	9 December 2020
9	Western Australian Registry System – Application Controls Audit	26 November 2020
8	Regulating Minor Pollutants	26 November 2020
7	Audit Results Report – Annual 2019-20 Financial Audits of State Government Entities	11 November 2020
6	Transparency Report: Major Projects	29 October 2020
5	Transparency Report: Current Status of WA Health's COVID-19 Response Preparedness	24 September 2020
4	Managing the Impact of Plant and Animal Pests: Follow-up	31 August 2020
3	Waste Management – Service Delivery	20 August 2020
2	Opinion on Ministerial Notification – Agriculture Digital Connectivity Report	30 July 2020
1	Working with Children Checks – Managing Compliance	15 July 2020

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