

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 27: December 2016

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

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**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

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*. It provides my opinions on the reasonableness and appropriateness of 41 decisions by 14 Ministers not to provide information to Parliament.

The decisions involved refusal to provide a strategic asset plan (SAP). All 14 Ministers claimed that the information sought was covered by Cabinet confidentiality and could therefore not be provided to Parliament.

In August 2016, I tabled my opinions on decisions by 3 Ministers not to provide SAPs to Parliament (*Opinions on Ministerial Notifications - Report 18*). In the current inquiries, we applied the same core principle that Cabinet-in-confidence (CIC) is to protect information that would reveal deliberations and decisions of Cabinet. In Report 18, we found it was not always appropriate to classify an entire SAP as CIC. This is because SAPs are not prepared solely for consideration by Cabinet and may contain both confidential and public information.

I wish to acknowledge the staff at the agencies involved for their cooperation with this report.

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

COLIN MURPHY
AUDITOR GENERAL
7 December 2016

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with decisions by 14 Ministers not to provide Parliament with copies of Strategic Asset Plans (SAPs) for 41 agencies (see Appendix 1: List of Ministers and agencies in these opinions).

Section 82 of the *Financial Management Act 2006* 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 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, ministerial offices, the State Solicitor's Office or other legal advisers
- interviews with key agency persons and ministerial chiefs of staff, 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.

As the reasons given by all 14 Ministers were that the information could not be provided for reasons of Cabinet confidentiality, we assessed each Minister's decision against Cabinet confidentiality considerations we developed and reported on in Report 18 (see Background).

While the investigations we conducted do not constitute an audit, our procedures have followed the key principles in the Australian Auditing and Assurance Standards.

Opinions

The decisions by the 14 Ministers not to provide the SAPs of 41 agencies to Parliament were not reasonable and therefore not appropriate.

Background

Before the 2016-17 Budget Estimates Hearings in June 2016, the Standing Committee on Estimates and Financial Operations (Committee) asked each agency the same 24 questions. Question 1.9 asked agencies to:

Please provide a copy of your 10-year Strategic Asset Investment Plan¹.

Between 1 and 21 June 2016, the 14 Ministers declined to provide copies of their agencies' SAPs. All responses were largely consistent with a suggested generic response developed by the Department of the Premier and Cabinet (DPC):

Strategic Asset Plans (SAPs) are prepared for Treasury as part of the Budget process to inform decision making by the Economic and Expenditure Reform Committee and Cabinet. Disclosure of these plans would reveal the deliberations and decisions of both bodies and are therefore considered Cabinet-in-Confidence. Until specific programs within a SAP have been considered and approved to proceed they remain indicative. Additionally and understandably 10 year SAPs are subject to a wide variety of exigencies including but not limited to priorities of the government of the day; changes in circumstances; changes in technologies and external events.

Between 7 July 2016 and 23 August 2016, the Auditor General received notices from the 14 Ministers advising of their decisions not to provide the requested information in accordance with section 82 of the *Financial Management Act 2006*.

Our previous work on assessing Cabinet confidentiality

In August 2016, we tabled *Opinions on Ministerial Notifications*² (Report 18). This report included the Auditor General's opinions on previous decisions by 3 Ministers not to provide SAPs to Parliament. In forming those opinions, we consulted a range of sources and guidelines for assessing Cabinet-in-confidence (CIC). It also set out our understanding of the content and purpose of SAPs.

In these current inquiries, we applied the same core principle that CIC is to protect information that would reveal deliberations and decisions of Cabinet. In Report 18, we found it was not always appropriate to classify an entire SAP as CIC. This is because SAPs are not prepared solely for consideration by Cabinet and may contain both confidential and public information. For more detail please see Report 18.

Treasury and DPC development of a suggested generic response

As the Committee had asked the same question of multiple agencies, the Ministers' chiefs of staff raised the possibility of a generic response. DPC then liaised with the Department of Treasury (Treasury) to create a 'suggested generic answer' based on Treasury and DPC views of existing practices and understanding of CIC. On 1 June 2016, a suggested answer was provided to all chiefs of staff.

¹ Referred to as 'Strategic Asset Plan' (SAP) in this report.

² The Office of the Auditor General. Report 18 Opinions on Ministerial Notifications, August 2016.

On the same day, Treasury instructed its staff to advise all agency heads not to release SAPs to the Committee on the grounds of CIC. Although this communication did not include the DPC suggested answer, the advice was similar.

Key findings

The decisions by Ministers to withhold the SAPs from Parliament were not reasonable and therefore not appropriate. This was because consideration by Cabinet is only one of the purposes of a SAP and none of the Ministers considered whether the SAPs contained publicly available or other information that could be provided to Parliament.

In 7 instances, agencies did not have SAPs to provide, yet the responsible Ministers did not give this fact in responding to the Committee's request:

- 1 agency has yet to create a SAP
- another agency had a Treasury exemption and did not prepare a SAP
- 5 agencies were not required to develop SAPs but instead provide information to a coordinating agency.

When answering parliamentary questions, Ministers may choose to seek advice from the agencies in their portfolio. Twelve Ministers sought advice from 25 agencies. In the remaining instances, Ministers were advised directly by their staff.

The advice given to Ministers was based on DPC and Treasury communications. To some degree, this is understandable. Treasury is responsible for the SAP process, and agencies rely on DPC for Cabinet matters.

However, in our view, determining the extent to which a SAP is protected by Cabinet confidentiality requires the specifics of each SAP to be considered. In no instance was a Minister provided with this analysis. We found that SAPs consistently contain:

- information that would not reveal the deliberations and decisions of Cabinet
- information that is already public.

It is our view that better practice would have been if the Ministers' advisors or agencies had considered each SAP in question to identify those parts of the SAPs that could be released. The failure to consider individual SAPs meant that Ministers received inaccurate information.

We recommend that:

- when asked for advice by their Minister, all agencies consider the specifics of an information request and provide analysis, key details and options for informing Parliament where applicable
- Treasury and the DPC should implement the recommendations of Report 18. These relate to providing advice to agencies on options for releasing information to address the needs of Parliament, and guidance on what information and documents would reveal Cabinet deliberations and are therefore confidential.

Central agency responses

Department of Treasury

From Treasury's perspective, it is pleasing that the large number of strategic asset plans (SAPs) that were developed by agencies has been reflected in the report. This reinforces the value of SAPs from across Government agencies in contributing to Budget deliberations by Ministers, the Economic and Expenditure Reform Committee (EERC) and Cabinet.

It is important to note that a one-size-fits-all approach is not used in preparing SAPs. For example, the report mentions that five agencies were included in a single SAP developed by the portfolio agency. When appropriate, this flexibility enhances the strategic value of the advice provided to Ministers, the EERC and Cabinet.

In addition, the report mentions that one agency was given an exemption from preparing a SAP. It should be noted that Treasury approves such exemptions only on rare and agreed occasions. This was done because the agency was engaged in a major sale process and after confirmation from the agency that SAP-equivalent advice would be developed for Cabinet as part of that process.

In terms of preserving the confidentiality of agencies' SAPs, Treasury has already agreed to seek Cabinet consideration of the new approach proposed by the Auditor General in August 2016 which would involve re-releasing SAP elements that are publicly available. However, as previously stated, little value would be gained given the substantial planning information that is released publicly in documents such as the Perth and Peel@3.5 million series and the related Transport Plan.

Department of the Premier and Cabinet

It is noted that the recommendations refer to those produced in Report 18 on a similar matter by the Auditor General. The Department continues to work, in collaboration with Treasury, to address those recommendations and improve understanding of the s.82 process and the public sector's understanding and application of the Strategic Asset Management Framework and Cabinet in Confidence principles. The Department considers that agencies involved in this particular inquiry followed the correct procedure in identifying the plans as constituting part of the deliberations or decisions of Cabinet. It is noted that the Auditor General has accepted that in this review parts of agencies' strategic asset plans did contain cabinet in confidence material.

The Department considers that requiring agencies to redact or amend their Strategic Asset Plan to remove material considered Cabinet in Confidence is time consuming and ultimately pointless when the remaining information is contained in publicly available documents. It is preferable for agencies to direct individuals to the publically available sources used in the plans or provide it directly to them.

Other agency responses

Agency	Response
Botanic Gardens and Parks Authority	The Botanic Gardens and Parks Authority notes the report. The BGPA takes matters of Cabinet confidentiality very seriously, and disclosure of SAP information was assessed in this context. The BGPA appreciates any formal advice that assists in achieving appropriate outcomes.
Department of Aboriginal Affairs	The Department of Aboriginal Affairs (DAA) has reviewed the key findings presented in the report and confirms that it has no objections to the findings. DAA will ensure that processes will take into account these findings for future advice to the Minister.
Department of Education	<p>The Department of Education considers that the Ministerial decision not to release the Strategic Asset Plan was reasonable given that the Strategic Asset Plan was prepared to inform decisions by Cabinet and the Minister. The decision was consistent with the previous decision not to release the Department's Strategic Asset Plan. It is noted that the request (in June 2016) was prior to the Auditor General releasing his opinion on the initial decision not to release the Strategic Asset Plan in August 2016.</p> <p>The Department has followed the protocols established by Treasury and the Department of the Premier and Cabinet in the management of the Strategic Asset Plan and notes that while the document contains information which is in the public domain it was not appropriate to release a document marked as Cabinet-in-Confidence even in a redacted form.</p> <p>The Department however recognises the need for Parliament to be informed about the state, demand and performance of the Department's assets and is working with Treasury to ensure relevant information is made available to Parliament.</p>
Department of Education Services	Strategic Asset Plans are prepared at the direction of Treasury, in a format prescribed by Treasury, principally for a purpose related to the budget process. The Department considers that Treasury and the Department of the Premier and Cabinet are the competent bodies to advise Ministers on cabinet confidentiality as it bears on Strategic Asset Plans. For a line agency to provide advice to a Minister on the interpretation of cabinet confidentiality contrary to the stated position of the central agencies that support relevant cabinet processes would be an unusual step.
Department of Health	The Department of Health reiterates its position on this issue, as tabled in the Opinions on Ministerial Notifications Report 18 August 2016, has not changed. The Department remains firmly of the view that the Minister's decision was reasonable and informed by expert advice received from the Department of the Premier and Cabinet, and Treasury. The Department will follow any changes made to policy by the Department of Treasury including guidelines on principles to assist the Department to determine what could be released (and not subject to Cabinet-in-Confidence) in future Strategic Asset Plans.
Department of Mines and Petroleum	The Department of Mines and Petroleum acknowledges the findings and will take the recommendations into consideration in the future.
Office of the Environmental Protection Authority	The Office of the Environmental Protection Authority (OEPA) recognises the importance of Parliament's access to information and gives due consideration to the provision of requested information in accordance with its understanding of protocols. The OEPA welcomes the Auditor General's findings in guiding future decisions of the agency.

Appendix 1: List of Ministers and agencies in these opinions

Minister (Date of notice)	Agency
Hon Peter Collier MLC (19 August 2016)	Department of Aboriginal Affairs
	Department of Education
	Department of Education Services
Hon Mia Davies MLA (19 August 2016)	Department of Sport and Recreation
	Department of Water
Hon John Day MLA (23 August 2016)	Department of Culture and the Arts
	Department of Health
Hon Joseph Francis MLA (15 July 2016)	Department of Corrective Services
	Department of Fire and Emergency Services
	Department of Fisheries
Hon Liza Harvey MLA (22 August 2016)	Department of Training and Workforce Development
	Central Regional TAFE
	North Metropolitan TAFE
	North Regional TAFE
	South Metropolitan TAFE
	South Regional TAFE
(Former Minister) Hon Colin Holt MLC ³ (11 July 2016)	Department of Racing, Gaming and Liquor
	Housing Authority
Hon Albert Jacob MLA (09 August 2016)	Department of Parks and Wildlife
	Office of the Environmental Protection Authority
	Botanic Gardens and Parks Authority
Hon Sean L'Estrange MLA (17 August 2016)	Department of Mines and Petroleum
Hon William Marmion MLA ⁴ (23 August 2016)	Department of State Development
	Department of Finance
Hon Michael Mischin MLC (07 July 2016)	Department of Commerce
	Department of the Attorney General
Hon Andrea Mitchell MLA (19 August 2016)	Department for Child Protection and Family Support
	Mental Health Commission
Hon Dr. Michael Nahan MLA (22 August 2016)	Department of Treasury
	WA Treasury Corporation

³ At time of printing Hon. Brendan Grylls MLA is the Minister for Housing; Racing and Gaming.

⁴ At time of printing Hon. Sean L'Estrange MLA is the Minister for Finance.

Minister (Date of notice)	Agency
(Former Minister) Mr Dean Nalder MLA ⁵ (19 August 2016)	Department of Agriculture and Food
	Department of Transport
	Fremantle Ports Authority
	Kimberley Ports Authority
	Main Roads Western Australia
	Mid West Ports Authority
	Pilbara Ports Authority
	Public Transport Authority
	Southern Ports Authority
(Former Minister) Hon Anthony Simpson MLA ⁶ (23 August 2016)	Department of Local Government and Communities

⁵ At time of printing Hon. Mark Lewis MLC is the Minister for Agriculture and Food, and Hon. William Marmion MLA is the Minister for Transport.

⁶ At time of printing Hon. Paul Miles MLA is the Minister for Local Government; Community Services.

Auditor General's Reports

Report number	Reports	Date tabled
26	Opinion on Ministerial Notification	23 November 2016
25	Opinion on Ministerial Notification	9 November 2016
24	Audit Results Report – Annual 2015-16 Financial Audits	9 November 2016
23	Western Australian Waste Strategy: Rethinking Waste	19 October 2016
22	Opinion on Ministerial Notification	13 October 2016
21	Opinion on Ministerial Notification	6 October 2016
20	Ord-East Kimberley Development	7 September 2016
19	Information and Communication Technology (ICT) in Education	17 August 2016
18	Opinions on Ministerial Notifications	11 August 2016
17	Financial and Performance Information in Annual Reports	21 July 2016
16	Grant Administration	7 July 2016
15	Management of Feedback from Public Trustee Represented Persons	30 June 2016
14	Management of Marine Parks and Reserves	30 June 2016
13	Maintaining the State Road Network – Follow-on Audit	29 June 2016
12	Regulation of Builders and Building Surveyors	22 June 2016
11	Information Systems Audit Report	22 June 2016
10	Opinions on Ministerial Notification	8 June 2016
9	Payment of Construction Subcontractors – Perth Children's Hospital	8 June 2016
8	Delivering Services Online	25 May 2016
7	Fitting and Maintaining Safety Devices in Public Housing – Follow-up	11 May 2016
6	Audit of Payroll and other Expenditure using Data Analytic Procedures	10 May 2016
5	Audit Results Report – Annual 2015 Financial Audits – Universities and state training providers – Other audits completed since 1 November 2015; and Opinion on Ministerial Notification	10 May 2016
4	Land Asset Sales Program	6 April 2016
3	Management of Government Concessions	16 March 2016
2	Consumable Stock Management in Hospitals	24 February 2016
1	Supplementary report Health Department's Procurement and Management of its Centralised Computing Services Contract	8 June 2016 17 February 2016

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