



GOVERNMENT OF
WESTERN AUSTRALIA
Our Ref:

C1305050

7 January 2014



PSC | Public Sector
Commission
Office of the Commissioner

Dr G. G. Jacobs MLA
Chairman
Education and Health Standing Committee
Parliament House
Perth WA 6000

Dear Dr Jacobs

DUTIES OF PUBLIC SECTOR CHIEF EXECUTIVE OFFICERS

I refer to your correspondence dated 23 December 2013, which requests my comments in relation to the obligations of public sector chief executive officers (CEOs) and the provision of information to responsible ministers.

Under the provisions of the *Public Sector Management Act 1994* (PSM Act), I am the employing authority of CEOs appointed under section 45 of the Act. Upon their appointment as CEO, I meet with new appointees to broadly discuss their roles, expectations and the obligations placed on them as CEO. This includes the relationship with their minister and the necessity to ensure their minister is:

- informed on the operations of the agency
- knowledgeable on other portfolio related matters
- supported to make effective decisions.

It is in this context that I provide the following comments.

1. Given that it is a necessary requirement of government that ministers are kept fully informed of the activities of their organisation, what are the corresponding duties of Departmental CEOs to provide this information? Where are these duties enshrined?

In the case of public service departments such as the Health Department, the relevant minister is referred to in the PSM Act as the *responsible authority* of the department. There are a number of principles set out in s7 PSM Act, Public administration and management principles. Principle (b) appears to be most relevant to the issues before your Committee:

- (b) *the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities;*

Section 29 (1) of the PSM Act (Functions of CEOs and chief employees) and in particular paragraph (b) also appears applicable to your query:

- (b) *to provide policy advice to the responsible authority of that department or organisation;*

Section 30 (a) of the PSM Act (Duties of CEOs and chief employees when performing functions) provides that CEOs shall:

- (a) *endeavour to attain performance objectives agreed with the responsible authority of the department or organisation;*

Section 47 of the PSM Act (CEOs, performance agreements etc. of) provides for CEOs to enter into a performance agreement with his or her minister and with me as their employer, and to renew these in accordance with Public Sector Commissioner's instructions from time to time.

Approved procedure 8 (<http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/approved-procedures/approved-procedure-8-ceo-performance-agreement-and-assessment>) outlines the timing (annually based on the financial year) and procedures to be followed when a CEO enters into a performance agreement.

These agreements are intended to set out the performance criteria to be met by the CEO in the period in which the performance agreement applies, and the minimum requirements for the assessment of a CEO's achievement of targets under the performance agreement.

Section 32 of the PSM Act (CEOs and chief employees to comply with directions etc. of responsible authority) provides that the CEO shall comply with all lawful directions and instructions from his or her minister as the responsible authority of the department.

Section 74 of the PSM Act (Relationship between ministerial officers etc. and employees of departments etc.) requires that ministers and CEOs make arrangements setting out the manner and circumstances in which communications are to be made between officers in the minister's office and employees in the department. These are not annual arrangements, but will generally be changed when there is a change of minister, of portfolio, or of the CEO.

The Public Sector Commission also provides relevant guidance for CEOs to assist in complying with the above requirements. A publication titled *Good governance guide for public sector agencies - Principles* (<http://www.publicsector.wa.gov.au/document/good-governance-guide-principles>) contains nine principles, of which numbers 1, 2, 7 and 8 appear relevant to the Committee's consideration. These are formulated as outcome principles. That is, they avoid prescriptive detail and leave scope for CEOs to determine how to achieve the required outcome. These state:

- Principle 1 Government and public sector relationship – the agency's relationship with the government is clear.

- Principle 2 Management and oversight – the agency's management and oversight are accountable and have clearly defined responsibilities.
- Principle 7 Finance – the agency safeguards financial integrity and accountability.
- Principle 8 Communication – the agency communicates with all parties in a way that is accessible, open and responsive.

Guidelines for CEOs when preparing performance agreements are also provided by the Commission and for preparing s74 communications agreements (<http://www.publicsector.wa.gov.au/document/public-sector-commissioners-circular-2009-10-comm-arrangements-between-min-and-agencies-s74-psma>)

2. As to ‘the activities undertaken by their organisations’, what activities would you classify as being sufficiently material to warrant disclosure to the Minister?

As noted in the *1974 Coombs Royal Commission into Australian Government Administration report*, a minister is at the centre of a very complex network of interests, and administrative arrangements work best if they do not impair those interests’ capacity to influence the minister. It is the primary task of department CEOs to assist their responsible minister in the administration of legislation for which the minister is responsible, and to the extent authorised or permitted by legislation, to implement the policies and priorities of the government of the day, as communicated by the relevant minister, expertly and loyally. It is an established convention that ministers will be kept in contact with key developments in his or her department.

Evaluating and deciding what information will warrant ministerial level attention, and when, will depend on both the established arrangements in place between the relevant minister and CEO, the working relationship between the minister and CEO, and on an evaluation of each particular circumstance. This inevitably involves a degree of informed judgement by the CEO. A minister is of course always free to request more detailed information or if he or she believes there are emerging problems to raise issues or seek reconsideration of matters.

I would expect that systemic faults in administration would be brought promptly to a minister’s attention. However, in practice ministers are not engaged in the direct administration of their departments and are not expected to have a full and detailed knowledge and control of all activities of his or her department. What is considered material to warrant disclosure by a CEO to a minister will vary according to a range of factors, including:

- nature of the portfolio (degree of public importance, size and complexity)
- relationship between minister and individual CEO (degree of confidence that the Minister has in the relevant CEO)
- experience of the CEO and expertise within the department

- the operational preferences of the particular minister (the extent to which the minister wishes to maintain strategic oversight or involve him or herself in operational detail)
- sensitivity of the matter at hand.

3. What discretion do Departmental CEOs have to decide what is of sufficient materiality to warrant disclosure to the minister?

- Is this decision solely discretionary, or are CEOs to be guided by any particular principles in exercising their discretion to disclose?**
- In any event, would information with significant contractual and financial implications for the State be automatically deemed to be of sufficient materiality to warrant disclosure to the minister?**

- (a) Provisions dealing with performance agreements and communication arrangements referred to above allow broad scope for ministers and CEOs to determine and agree key deliverables, a reporting regime or regular 'key issues' briefings on matters of importance, and in whatever level of detail, a responsible minister determines is necessary for them to be appropriately informed. In the absence of specific direction from the minister the judgment of the CEO is crucial however this is not left solely to the CEOs discretion.

The CEO's judgement will be informed by the performance agreement, communications arrangement and the working relationship between the minister and CEO. In broad terms a test of "no surprises, good or bad" is a useful guide for disclosure.

- (b) Information with significant contractual and financial implications for the State would not of itself necessarily demand ministerial disclosure if those implications were contingent on factors which had not yet crystallised.

For example, if legal advice were being sought about the prospective liability of the State for a particular contractual obligation a CEO may well judge that he or she will wait for that advice before informing his or her minister of the potential liability. There are so many variables that it is not productive to speculate on materiality of information without regard to context and the particular circumstances of each individual instance. Major infrastructure projects, in particular those that involve multiple agencies and have complex governance arrangements can establish specific obligations on a CEO.

Project managers of large scale complex projects such as the Fiona Stanley Hospital, also create their own reporting instruments and may establish unique reporting protocols to the CEO, and possibly direct the relevant minister(s) that sit outside (or extend) protocols in a communications agreement.

Project governance documentation including risk management reporting, stakeholder communication plans and the like may stipulate the nature and frequency of reporting against milestones and performance indicators to various stakeholders. The operation of other governance controls would be significant to the judgement being exercised by the CEO. For example, other regular formal project reporting or the presence of steering committees that considered project status information regularly, and the nature of Treasury or State Supply Commission oversight reporting may also impact on this judgement.

4. What are the consequences of failure to observe these duties?

As my employees, CEOs of departments are subject to substandard performance, disciplinary and improvement action under Part 5 of the PSM Act (Substandard performance and disciplinary matters).

Further, departmental CEOs can be removed by the Governor on my recommendation without cause (s49 of the PSM Act).

Where a minister loses confidence in a CEO, that CEO can be transferred at any time by the Governor on my recommendation either to another office in the public service or to 'other functions' (s50 of the PSM Act). Prior to making such a recommendation I am required to consult with the relevant minister (as the responsible authority of the department), with the relevant CEO and, in the case of a transfer to another agency, with the responsible minister of that other agency.

Disciplinary or substandard performance proceedings and decisions about termination or transfer of CEOs are not able to be litigated (s52 of the PSM Act).

I trust this information is of assistance to you and your Committee.

Should you require any further information, I am available on 6552 8551.

Yours sincerely



M C Wauchope

PUBLIC SECTOR COMMISSIONER