

# Western Australian Auditor General's Report



## Opinion on Ministerial Notification



Report 21: October 2016

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## WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

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### **Opinion on Ministerial Notification**



**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 provides my opinion on the reasonableness and appropriateness of a decision by the Minister for Corrective Services not to provide information to the Legislative Council Standing Committee on Public Administration (Committee).

I have been unable to obtain sufficient appropriate evidence on the Minister's decision not to provide information to the Committee. Accordingly, I am unable to form an opinion whether that decision was reasonable and appropriate.

This report outlines the circumstances through which I arrived at this conclusion and highlights deficiencies with the *Auditor General Act 2006* in relation to access constraints to documents protected by legal professional privilege. Appendix 2 of my Report 19, 'Opinions on Ministerial Notifications' tabled in August 2015, provides some background to this issue.

I wish to acknowledge the cooperation of the staff at the Department of Corrective Services.

A handwritten signature in black ink, appearing to read 'Glen Clarke'.

GLEN CLARKE  
ACTING AUDITOR GENERAL  
6 October 2016

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# Ministerial decision not to provide information to Parliament

## Introduction

This report deals with a decision by the Minister for Corrective Services, the Hon Joe Francis MLA not to provide information to the Legislative Council Standing Committee on Public Administration (Committee). The information requested was:

- an unredacted copy of the mid-term review of the Court Security and Custodial Services Contract (Review)
- the Public Sector Comparator (Comparator) developed for the previous Court Security and Custodial Services tender process.

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](http://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, the State Solicitor's Office (SSO) or other legal advisers
- interviews with key agency staff including discussions about our draft findings and the Auditor General's opinion.

Our procedures are designed to gather sufficient appropriate evidence to support an independent view to Parliament on the reasonableness and appropriateness of the Minister's decision. However, because of the matter described in the Disclaimer of Opinion paragraph below, we were not able to obtain sufficient appropriate audit evidence to provide a basis for an opinion.

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 Minister for Corrective Services' decision not to provide the requested information to the Committee. Accordingly, I am unable to form an opinion whether his decision was reasonable and appropriate.

The Department of Corrective Services (Department) informed me it relied on legal advice from the SSO when it advised the Minister not to provide an unredacted copy of the Review and the Comparator to the Committee. The Department declined to provide me with a copy of the legal advice or an unredacted copy of its briefing notes to the Minister.

The Department advised us that its refusal was based on the SSO's view that the legal advice and the parts of the briefing notes that refer to its content, were protected by legal professional privilege and that the AG Act did not enable me to see the advice without it losing its protected status.

Because the legal advice was crucial to the Department's advice to the Minister, my inability to view this material meant that I was unable to reach an opinion on the Minister's decision.

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 second occasion we have been placed in this position.

The SSO has previously advised us that the AG Act did not provide the Auditor General with the authority to demand access to legal advice. Appendix 2 of Report 19, 'Opinions on Ministerial Notifications' tabled in August 2015, provides some background to this issue.

The Joint Standing Committee of Audit (JSCA) recognised this impediment to the Auditor General's ability to perform his legislated functions and recommended action in its 2016 report on the effectiveness of the Office<sup>1</sup>. The JSCA recommended urgent amendment to the AG Act to provide the Auditor General with clear authority to compel a person to provide any information required, including documents subject to legal professional privilege, Cabinet confidentiality or any other public interest immunity. I welcome this as a positive step.

## Background

During its own-motion inquiry into the Transport of Persons in Custody in Western Australia, the Committee requested information on a number of occasions between May and December 2015, regarding the:

- mid-term review of the Court Security and Custodial Services Contract (Review) dated 2 December 2014
- Public Sector Comparator (Comparator) developed for the previous tender process for the Court Security and Custodial Services (CS&CS) Contract.

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<sup>1</sup> Recommendation 2, Report 7, Joint Standing Committee on Audit, Review of the Operation and Effectiveness of the *Auditor General Act 2006*.

The Committee's June 2016 report<sup>2</sup> details these requests. On 29 September 2015, the Minister provided the Committee with a redacted copy of the Review. The Committee then requested a copy of the unredacted Review and the Comparator on 20 November 2015.

On 27 November 2015, the Minister declined to give this information on the basis that the documents contain commercially sensitive information, the public disclosure of which could prejudice the State's position in relation to the re-tender. Further information regarding the requests and correspondence is included in the Appendix.

On 11 December 2015, the Auditor General received the Minister's notice in accordance with section 82 of the FM Act of his decision not to provide the information.

## Key findings

### We were unable to access the Department's legal advice

The Minister properly sought advice from the Department of Corrective Services (Department) before responding to the Committee's requests. The Department told us it recommended the requests be declined based on its assessment that the requested information was commercial-in-confidence, and on advice from the State Solicitor's Office (SSO).

We asked to see the Department's briefing notes to the Minister, and a copy of the SSO advice. The Department provided us with a redacted copy of the briefing notes but did not provide a copy of the SSO advice. The Department advised that the SSO advice and the redacted parts of the briefing notes were subject to legal professional privilege and release of the information would result in it losing its protected status.

While we appreciate the Department's cooperation and concerted efforts to provide as much information as the SSO said it could, our inability to view the full briefing notes or the legal advice limits the scope of our work. This means we could not determine if the Department's analysis and reasoning for its advice to the Minister was sound.

We also sought to assess the nature of the requested information against our standard commercial-in-confidence criteria but were again affected by a lack of sufficient appropriate evidence – see below.

In the absence of this information, it is not possible to form an opinion as required by the AG Act. 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.

### Public sector comparator

The Minister decided not to provide the Comparator to Parliament because it was commercial-in-confidence. Even though the Department would not provide us with the full briefing notes or the legal advice that supported this decision, we still attempted to determine whether the information satisfied our standard commercial-in-confidence criteria. However, we again found that without all the material informing the Minister's decision, we could not conclude.

When we reviewed the Comparator, we found that the entire document was marked as 'confidential'. In our view, the information to be protected is not then specifically identified.

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2 Report 26, Standing Committee on Public Administration, Transport of Persons in Custody, pp 10-13.



The purpose of a public sector comparator is to establish what cost government would pay should it choose to deliver a project itself. This then allows it to conclude as to whether a public private partnership offers value for money. This comparative analysis is done on a like-for-like basis<sup>3</sup>.

The guidelines endorsed by the Council of Australian Governments state that 'Generally, the Raw PSC [the Comparator] will be disclosed unless there is justifiable (commercial) reasons for non-disclosure'<sup>4</sup>.

If the guidelines were followed, then the Comparator should have been made public during the initial CS&CS tender process in 2010, unless there were justifiable reasons for non-disclosure.

The Department provided us with no evidence that it had made such an assessment, and our inability to sight the SSO legal advice or the Department's full briefing notes to the Minister meant that we could not determine whether not disclosing the Comparator was reasonable.

### **The mid-term review of the Court Security and Custodial Services Contract**

The mid-term review was conducted in December 2014 by an independent consultant engaged by the Department to:

- determine whether the CS&CS Contract:
  - delivers the intended outcomes
  - meets the needs of Government
  - provides a 'value for money' outcome to the State
- determine and assess procurement options.

The Minister advised that redacted information in the Review was commercial-in-confidence. As with the Comparator, we attempted to determine whether the information satisfied our standard commercial-in-confidence criteria. While some parts of the redacted Review appear by their nature to attract confidentiality, other parts included some publicly available information. We examined the redacted and un-redacted versions of the Review and found one of the criteria was met, but we were unable to fully conclude on the others.

#### *Our Criterion – the information to be protected must be specifically identified*

This criterion was met. Although the whole Review was marked as 'private and confidential', the Department identified specific elements as confidential. These were also included in the Minister's notice under section 82 of the FM Act as:

- current volumes of services and costs of various aspects of service delivery under the current CS&CS Contract
- the risk adjusted Public Sector Comparator values for the current CS&CS Contract – (the Comparator is covered above)
- market sounding information – (this is a research tool that tests the feasibility of the project and provides an assessment of market competitiveness and capability of the private sector to deliver the project).

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3 Section 1 What is a Public Sector Comparator?, Public Private Partnerships Public Sector Comparator Policy, Additional Policy Guidance, Department of Treasury, January 2013 pp 3.

4 Section 3.6 Disclosure of the PSC, National Public Private Partnerships Guidelines, Volume 4: Public Sector Comparator Guidance, Commonwealth Department of Infrastructure and Regional Development, December 2008 pp 13.

*Our Criterion – the information must be ‘commercially sensitive’ meaning that the information should not generally be known or ascertainable*

This criterion was met for the market sounding information. The information was specifically provided by private sector entities for use in the Review, and we could not find it readily available elsewhere.

However, we could not conclude whether this criterion was met for the current volumes of service and costs of various aspects of service delivery under the CS&CS Contract that were also redacted.

Similar information is publicly available, such as the total cost of providing Custody Movement Services which can be found in the CS&CS Annual Report 2013-14 published on the Department’s website. The CS&CS Contract also contains financial information. But, as we were denied access to the Department’s full briefing notes to the Minister, we could not conclude if the Department had considered if this information was commercial-in-confidence.

We saw some instances where information had been redacted in one part of the review, but not in another. For instance, the number of participants involved in the market sounding exercise was redacted in one part of the review, but was available in another part. These inconsistencies were considered minor. We have recommended the Department improve its processes to ensure redaction of documents is consistent and has regard for publicly available information.

*Our Criterion – disclosure would cause unreasonable detriment to the owner of the information or another party*

We were unable to conclude on this criterion. This criterion seeks to establish and balance any detriment or harm that releasing the information could cause to the State or another party against the information needs of Parliament and the public. In this instance, the Committee demonstrated a clear interest in this information. Our inability to view the Department’s full briefing notes to the Minister and its legal advice meant that we could not conclude on this criterion.

The Minister indicated that the publication of the information would provide a competitive advantage for some bidders in a re-tender process and therefore disadvantage the State’s ability to get the most competitive bid. The Department did not provide evidence to support these statements. However, this caution does appear reasonable for the market sounding information.

*Our Criterion – the information was provided under an understanding that it would remain confidential*

This criterion was met for the market sounding information. The Department of Finance’s Procurement Practice Guide<sup>5</sup> recognises an ‘obligation of confidence’ for market sounding information collected by non-public means and provided to government – which was the case in this instance.

It was not evident that this criterion was met for the volumes and costs of service delivery under the CS&CS Contract. The Review was prepared by a consultant. The consultant’s confidential information does not appear in the Review. The Department therefore does not appear to owe an obligation of confidentiality to the consultant regarding the content of the Review. The consultant also stated that it did not have any interest in the outcome of the Review other than the preparation of the report.

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5 Department of Finance WA Procurement Practice Guide – A Guide to Products and Services Contracting, for Public Authorities, May 2016, Appendix – Market Sounding Guidelines pp 75.

It was also not evident that the Department owes an obligation of confidentiality to the current CS&CS provider. The Contract with the provider is publicly available and in it the provider acknowledges that the Contract will be publicly disclosed and tabled in Parliament. The tabled version of the Contract contains financial information including pricing.

Without evidence to the contrary, which may or may not be in the briefing notes or the SSO advice, it does not appear that this criterion was met for the costs under the Contract. As indicated earlier, the volumes of service is publicly available in the CS&CS Annual Report published on the Department's website.

### **Committee request to view the information**

On 2 December 2015, the Committee wrote to the Minister to request an un-redacted copy of the Review and the Comparator on a 'no publication, no copy' basis, and that 'notes will not be taken and the Clerk will return the document(s) at the expiry of the three month period'. This option meant that members of the Committee would be able to review both documents but not be able to take notes or publish or copy them.

On 11 December 2015, the Minister replied saying that he would not provide the requested information on the basis of advice from the SSO. This decision appeared inconsistent with an earlier decision by the Minister to provide the Committee with a copy of a review of the CS&CS Contract by the Department of Finance, together with a request to keep the document private.

In the absence of the SSO advice and without other persuasive evidence, it was difficult to see how the circumstances surrounding the Comparator and the Review were significantly different to the Department of Finance review and warranted a more cautious approach.

## **Response from the Department of Corrective Services**

The Department of Corrective Services notes that the Auditor General was unable to form an opinion on whether the Minister for Corrective Services' decision to not provide the Standing Committee on Public Administration with information was reasonable and appropriate because the Department declined to provide him with a copy of legal advice, or unredacted copies of briefing notes to the Minister.

The Department declined to provide the Office of the Auditor General with these documents on the basis that it would result in the waiver of legal professional privilege attaching to the State Solicitor's legal advice. The Department notes that the Office of the Auditor General was offered the opportunity to view the advice at the Department's premises on the understanding that it would not refer to the advice in its report. The Office of the Auditor General was unable to accept this arrangement given its obligations under the Auditing Standards and the *Auditor General Act 2006*.

Consistent with the Melaleuca Remand and Reintegration Facility tender, in November 2016 the Minister for Corrective Services will table in Parliament a Project Summary in relation to the CS&CS tender, subject to negotiations being completed.

## Appendix: Committee requests for information and the Minister's responses

Date of the Committee's request	Matter	Response	Date of response
20/11/2015	The Public Administration Committee wrote to the Minister to request 'a copy of the un-redacted ... [Review]'	<p>The Minister responded to the Committee's request stating 'I wish to reiterate that the Review contains commercially sensitive information.</p> <p>As you are aware, the Government will be re-tendering the CS&amp;CS contract in the near future. Based on advice from the State Solicitor's Office, I consider that public disclosure of the commercially sensitive parts of the ... [Review] could prejudice the State's position in relation to the re-tender. The State may not obtain the optimal tender price through the re-tender process, and its ability to deliver cost effective correctional services to the community may be compromised.</p> <p>In order to protect the integrity of the procurement process, and to minimise any detriment to that process, I respectfully decline your request for an un-redacted copy.'</p>	27/11/2015
02/12/2015	The Committee wrote to the Minister requesting an un-redacted copy of the Review and the Comparator for a three month period 'on a no publication, no copy basis', stating that 'notes will not be taken and the Clerk will return the document(s) at the expiry of the three month period.'	<p>The Minister wrote to the Committee declining their request for the Review and the Comparator stating 'the Government will be re-tendering the CS&amp;CS contract in the near future. Based on advice from the State Solicitor's Office, I remain of the view that public disclosure of the commercially sensitive parts of the ... [Review] could prejudice the State's position in relation to the re-tender. The State may not obtain the optimal tender price through the re-tender process, and its ability to deliver cost effective correctional services to the community may be compromised. The same concerns apply to the public disclosure of the PSC [Comparator].</p> <p>In order to protect the integrity of the procurement process, and to minimise any detriment to that process, I respectfully decline your request to provide a copy of the ... [Review] and PSC [Comparator] ...'</p>	11/12/2015
N/A	Section 82 notice	The Minister wrote to the Auditor General in accordance with section 82	11/12/2015

		<p>of the FM Act of his decision not to provide the information. The Minister's reasons for his decision that the information is commercially sensitive are:</p> <p><i>'The information requested was specifically redacted as "commercial-in-confidence" as it includes current volumes of services and costs of various aspects of service delivery under the current CS&amp;CS Contract with Serco; the risk adjusted Public Sector Comparator values for the current CS&amp;CS Contract, which will remain of relevance for the re-tender; and market sounding information gained from potential interested bidders. The publication of this information may provide a competitive advantage to some bidders over others in the re-tender process.</i></p> <p><i>If released, this information would disadvantage the State's ability to get the most competitive bid and value for money from the re-tender process.</i></p> <p><i>It could also jeopardise future negotiations, prospective tenderers may be apprehensive of entering into contracts with the State if their information obtained during the market sounding period becomes public.'</i></p>	
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## Auditor General's reports

Report number	Reports	Date tabled
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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