

Western Australian Auditor General's Report



Opinions on Ministerial Notifications



Report 6: 2019-20
18 September 2019

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

Opinions on Ministerial Notifications



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

Opinions on Ministerial Notifications

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

It deals with 2 decisions by 2 Ministers not to provide information to Parliament:

- One decision by the Minister for Education and Training, the Hon Sue Ellery MLC, not to provide Parliament with 2 documents previously released to the Hon Mia Davies MLA under the *Freedom of Information Act 1992*.
- One decision by the Minister for Child Protection; Women's Interests; Prevention of Family and Domestic Violence; Community Services, the Hon Simone McGurk MLA, not to provide information to Parliament about an information session on out-of-home care.

A handwritten signature in black ink, appearing to read "C Spencer".

CAROLINE SPENCER
AUDITOR GENERAL
18 September 2019

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 2 decisions by 2 Ministers not to provide information to Parliament.

- One decision by the Minister for Education and Training, the Hon Sue Ellery MLC, not to provide Parliament with 2 documents previously released to the Hon Mia Davies MLA under the *Freedom of Information Act 1992* (FOI Act).
- One decision by the Minister for Child Protection; Women's Interests; Prevention of Family and Domestic Violence; Community Services, the Hon Simone McGurk MLA, not to provide information to Parliament about an information session on out-of-home care.

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* 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 matters 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.

Ministerial decision not to provide documents previously released under the FOI Act

Opinion

The decision by the Minister for Education and Training, the Hon Sue Ellery MLC, not to provide Parliament with 2 documents previously released under the FOI Act was not reasonable and therefore not appropriate, as most of the information in these documents was publicly available.

Background

In Parliament on 13 June 2018, the Hon Martin Aldridge MLC asked Question without Notice 456 to the Minister for Education and Training, requesting 11 documents unredacted and in full, previously released to the Hon Mia Davies MLA under the FOI Act. The Minister declined to provide the documents.

On 18 October 2018, the Minister tabled supplementary information, providing 9 of the 11 requested documents in redacted form. The Minister declined to provide 2 of the 11 documents requested (13A and 17A).

The full transcript of the Parliamentary question and the Minister's response is in Appendix 1.

On 2 November 2018, the Auditor General received the Minister's notification of the decision not to provide documents 13A and 17A, in accordance with section 82 of the FM Act.

Key findings

The decision by the Minister not to provide documents 13A and 17A was not reasonable and therefore not appropriate, as most of the information in these documents was publicly available.

The Minister did not seek advice from the Department of Education before responding to the Parliamentary request, but did seek legal advice from the SSO. We wrote to the SSO to obtain a copy of this legal advice, but this was not provided, as in SSO's view, releasing the information could waive legal professional privilege. However, we were able to obtain other sufficient and appropriate evidence on which to base an opinion.

The Minister's section 82 notice advised that documents 13A and 17A were not provided to Parliament because they contained factually inaccurate information. During our inquiry, the Minister's office told us what information in the documents she considered factually inaccurate.

We assessed documents 13A and 17A and found:

- a. the information the Minister considered to be factually inaccurate was less than 10% of the documents
- b. the Minister released documents 13A and 17A, to the Hon Mia Davies MLA, under the FOI Act in 2018. We reviewed the FOI notice of decision, which provided full access to the information in scope of the FOI application. Only information outside the scope of the FOI application was redacted from the documents
- c. the majority of the information in the documents was generally known or easily ascertainable using publicly available sources at the time the Minister declined to provide them. This included information sourced from Ministerial media statements,

Hansard, the Department's Schools Online website and unredacted information in the other 9 documents tabled by the Minister.

During our inquiry, the Minister's office told us that the Minister was obliged to provide Parliament with factual and accurate information. They directed us to Section 3 of the 2017 Ministerial Code of Conduct and the practice reflected under Section 5.7 of A Guide to Ministerial and Departmental Staff (Parliamentary Guide), which sets out the process for rectifying errors in tabled papers.

In our view, the Minister could have provided documents 13A and 17A to Parliament along with information about the factual inaccuracies.

Ministerial decision not to provide a full briefing note about an out-of-home care information session

Opinion

The decision by the Minister for Child Protection; Women's Interests; Prevention of Family and Domestic Violence; Community Services, the Hon Simone McGurk MLA, to provide Parliament with a redacted briefing note about an out-of-home care information session was reasonable and therefore appropriate.

Background

In Parliament on 12 March 2019, the Hon Nick Goiran MLC, asked the Leader of the House representing the Minister for Child Protection for the briefing note about an out-of-home care information session held on 13 February 2019.

On 10 April 2019, all parts of Question on Notice 1963 were answered, with a redacted briefing note provided in answer to part (e).

The full transcript of the Parliamentary question and the Minister's response is in Appendix 2.

On 24 April 2019, the Auditor General received the Minister's notification of the decision not to provide the full requested information in accordance with section 82 of the FM Act.

Key findings

The decision by the Minister to provide Parliament with a redacted briefing note was reasonable and therefore appropriate.

The Minister properly sought advice from the Department of Communities (Department) before responding to the request. The Department recommended that the briefing note be tabled with information redacted. In making its recommendation, the Department sought advice from the Department's General Counsel and the SSO.

The Department concluded that the release of the entire briefing note would likely negatively impact future procurement of out-of-home care services, given the commercially sensitive nature of the information.

We assessed the redacted information against two key criteria. Specifically:

Criterion 1 – Is the information sufficiently secret? Is it significant?

This criterion was met. We found that the redacted information in the briefing note was not generally known nor ascertainable using publicly available sources at the time the Minister declined to provide it. We compared the redacted information in the briefing note to the information presented at the information session on 13 February 2019 and found the redacted information was not presented. The redacted information included current service provider occupancy rates and funded placements, and the impacts of a proposed reform model on individual service provider funding.

Criterion 2 – Is it in the public interest for the information to remain confidential?

This criterion was met. In assessing this, we weighed the public interest in releasing the redacted information against the possible harm to the interests of government or another party. We concluded that the commercial interests of current service providers could be adversely affected if the information was released. The tabled briefing note disclosed the names of current service providers and their annual funding levels. However, we found that

reasonable grounds exist for keeping the redacted information confidential as it could reveal service provider business models.

We also found that government interests could be adversely affected. The Department is developing a new service model as part of a suite of out-of-home care reforms. The reforms are intended to provide greater accountability for out-of-home care funding. The information was essential to government's evaluation of the reform model, including the model's suitability and the possible financial impacts on service providers. Release of the information could be detrimental to ongoing government consultations with key stakeholders.

Response from the Department of Communities

The Department of Communities (Communities) notes the findings of the Auditor General set out in this Opinion. The Minister's decision to redact certain sensitive information from the briefing note was made after careful consideration and to protect the commercial interests of current service providers and the commercial interests of the State. Communities welcomes the Auditor General's finding that this was reasonable and therefore appropriate.

Appendix 1: Full transcript of Question without Notice 456

In Parliament on 13 June 2018, the Hon Martin Aldridge MLC, asked the Minister for Education and Training, the Hon Sue Ellery MLC for the following information:

I refer to documents released to Hon Mia Davies, MLA, under freedom of information application 61–06899. Will the minister table the following documents un-redacted and in full: document 5A—a letter to the Western Australian Education Support Principals and Administrators Association; document 6—an email from Liz Carey to Kris Doherty dated 13 December 2017 with the subject line "RREAC"; document 12—an email from Amy McKenna dated 13 December 2017 with the subject line "List"; documents 13 and 13A—an email, including attachments, from Liz Carey to Amy McKenna dated 13 December 2017 with the subject line "RE: Confidential—media release and master doc"; documents 14 and 14A—an email, including attachments, from Liz Carey dated 13 December 2017 with the subject line "MP key lines.docx"; documents 17 and 17A—an email, including attachments, from Amy McKenna to numerous recipients dated 12 December 2017 with the subject line "VTSS Narrative.docx"; and documents 20 and 20A—an email, including attachments, from Kathy Digwood to Liz Carey dated 11 December 2017 with the subject line "Members 1.docx"?

On 13 June 2018, the Minister declined to give this information, replying:

I thank the honourable member for some notice of the question. No. The documents were released to Hon Mia Davies, MLA, under her freedom of information application in accordance with the Freedom of Information Act 1992. Access to the documents was granted on the basis that some, but not all, of the information fell within the scope of her application. Information that was outside the scope of the application, including personal information, was redacted. Should the applicant wish to appeal the decision she is able to lodge a complaint with the Western Australian Information Commissioner seeking external review.

On 18 October 2018, the Minister provided supplementary information to Question without Notice 456, and states:

I have some information for Hon Martin Aldridge about question without notice 456, asked on 13 June 2018. I have determined not to table two of the 11 documents requested. A section 82 notice will be tabled in that regard. I tabled the attached information. [See paper 2076.]

Appendix 2: Full transcript of Question on Notice 1963

In Parliament on 12 March 2019, the Hon Nick Goiran MLC asked the Leader of the House representing the Minister for Child Protection; Women's Interests; Prevention of Family and Domestic Violence; Community Services, for the following information:

I refer to the information session on Out of Home Care that took place on 13 February 2019, and I ask:

- (a) who presented at that information session;*
- (b) who was in attendance;*
- (c) will the Minister table a copy of the documents provided and those documents presented at the session;*
- (d) has the Minister been briefed about the information session; and*
- (e) if yes to (d), will the Minister table a copy of the briefing note or if one was not provided a copy of the documents created as a result of the briefing?*

On 10 April 2019 the Hon Sue Ellery MLC replied:

- (a) Staff from the Department of Communities including:*
 - Assistant Director General, Service Delivery: Metropolitan Communities*
 - General Manager, Strategy and Reform*
 - Chief Financial Officer*
 - A/Executive Director, Contracting, Market Innovation and Partnerships*
- (b) Representatives from various community sector organisations and Aboriginal community controlled organisations were in attendance.*
- (c) Yes, [See tabled paper no 2612.]*
- (d) Yes*
- (e) Yes, [See tabled paper no 2612.]*

Auditor General's reports

Report number	2019-20 reports	Date tabled
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

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