STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

PROVISION OF INFORMATION TO PARLIAMENT

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 16 MARCH 2015

SESSION ONE

Members

Hon Ken Travers (Chair)
Hon Peter Katsambanis (Deputy Chair)
Hon Martin Aldridge
Hon Alanna Clohesy
Hon Rick Mazza

Hearing commenced at 2.34 pm

Mr COLIN MURPHY
Auditor General, examined:

Mr GLEN CLARKE
Deputy Auditor General, examined:

The CHAIR: On behalf of the committee, I would like to welcome you to today's hearing. Have you signed the document entitled "Information for Witnesses"?

The Witnesses: Yes.

The CHAIR: Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them, and ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. I should add that the committee has resolved that, as we do with our budget and annual report hearings, we will put the uncorrected version up on our website once it becomes available, with a clear indication that it is uncorrected and cannot be used for quoting and the like. If there is anything glaring that you see, please let us know, but otherwise you will get the normal 10 days to give any corrections to us. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you the publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege, although as I have pointed out, often the committee does publish the uncorrected version for people's information, but with a clear understanding that it is an uncorrected version.

Today we are here with the committee's inquiry into the provision of information to Parliament, particularly the operations of sections 81 and 82 of the Financial Management Act. We have received your written submission, but I now invite you, if you wish to do so, to make any opening statement to the committee.

Mr Murphy: Chair, I do not really have an opening statement. We have received legal advice, which raises a number of interesting issues, but I am sure that will come out in discussions, so I am happy to go straight into questions if you like.

The CHAIR: Firstly, thank you for your submission. You do make reference to the legal advice and the opinion the committee has sought from Mr Brett Walker QC about the operation of those two sections of the Financial Management Act, in particular the operation of section 82, but it brings in well the question of section 81. I think you were provided with a copy of that legal opinion last week. Obviously, it suggests a number of things in terms of the way in which you operate and the view of Mr Walker as to how those sections should operate, and the impact that would have on the way in which you assess matters. I guess the first one is the question, which we have certainly discussed amongst ourselves previously, about whether, where an agency or a minister has not provided a section 82 certificate, there is some obligation for you to pursue that on the basis that

that is a requirement that they should have fulfilled. I understand that it is possibly not possible for you to be monitoring every question asked in Parliament, and whether or not the ministers have complied with section 82 when they have refused the information to Parliament, be that through Parliament or its committees, but when it is raised with you by someone that that has not occurred, do you have any comments to make about Mr Walker's view that you do have some role there?

Mr Murphy: Look, I do, Chair, and this is an issue that we have considered at some length before getting Mr Walker's opinion. Certainly, I have had representations put to me that matters should be subject to review even though a notice had not been given to me. That was an issue that we looked at over a number of years. The advice that I have had to date suggests that I am at liberty to look at issues without notice, but I do not have an obligation until such time that I get a notice. It works fairly well, as you would imagine, from a practical point of view because, with a clear delineation of when I am required to act, operationally that makes things easier for my office. If that were not the case, and I had some other obligation, then I would need to have some means of delineating where that obligation started and stopped. Certainly, the advice from Mr Walker suggests that there can be an obligation, although I note the advice is a little guarded in that it says that section 24(2)(c) does not in terms require a notice and could practically, at least in some cases, operate without one, so it is far from an absolute requirement, but I do see that the door is open, and that is an issue that I am very keen to explore by getting further legal advice. One of the issues that we discussed is my capacity to follow up with ministers, for example, if I get representations that said the minister has not provided a notice and it needs to. It would certainly be within my power and my role to write to that minister that this has been drawn to my attention, and to remind them of the requirements under section 24. Certainly that is something that I am keen to pursue, and I will be looking to get further legal advice on that, but if there is any guidance that the committee has as to how they would see it operating, I would certainly welcome that too.

The CHAIR: I guess I cannot speak for the committee; we have not resolved on it, but as I said in my introductory remarks to the question, I do not think anybody would expect you to be trolling through the *Hansard* to say that the minister did not answer that question, and we should now go off and investigate them, but certainly I know that in the past I have raised the question with you personally—I cannot remember whether it was through the committee structure or outside it—where I believed that that there were certain ministers who did not comply. The Minister for Tourism, for instance, I think is very good at providing those certificates; we regularly see them being provided. I think there are other ministers who regularly fail to provide information or in any way answer questions, or to provide information, and never submit section 82 certificates. It just does not seem to be a part of the processes. I suspect that it is one of those situations in which some occasional polite reminders from yourself may encourage them and then, if there is continued recalcitrance, an inquiry into the fact that they are not even submitting section 82 certificates. My view is that even without section 82 you have the ability to investigate whether agencies are complying with the financial acts of the state, which is effectively one of your broader roles. I cannot see how you would not have power in that regard, and that might actually prompt ministers to ensure that they put in place a proper compliance regime, and then the question disappears.

Mr Murphy: Absolutely, Chair. The process that you have outlined is one that I am quite keen to explore, and sounds perfectly reasonable to me. The issue for the office when these provisions were enacted was trying to get a balance between meeting the requirements of the statute, which is paramount because I have taken an oath to do that, recognising the role of the Parliament in itself, and also preserving the independence of the role of the Auditor General. I see my role as providing information, advice and opinions to the Parliament, not being the policeman of the Parliament, so it is a matter of finding that balance in the role. Certainly the approach you have outlined I think does offer us a way forward.

The CHAIR: One of the things that this committee might do is go through and see if we cannot identify some areas where there has been, in our view, a failure to provide section 82 certificates.

We now as a matter of course remind ministers, when they tell us we cannot have something, of section 82 certificates in the correspondence when we write back to them and say that we do not find it acceptable that they have asked us to FOI that document, or we do not find it acceptable that the minister has said he is just not going to provide it to us, even with a request that it be kept confidential. We might be able to go through and identify where there are ministers who are not regularly submitting section 82 certificates. As I say, just from my own experience, I have seen that the Minister for Tourism regularly submits certificates, and you regularly report on them, so that is an issue. I should also make clear, too, that I do not think it is the committee's intention for this hearing to be seen to be suggesting that your practices are not right; it is just about how we constantly improve and work out. Sections 81 and 82, when they came in, even though it is a while ago now, have taken some time, and I think they are fairly unique to the best of my knowledge, anywhere in the commonwealth. I think we were unique in putting it into our legislation.

Mr Murphy: That is absolutely my view. It has been referred to me as first-generation legislation, and I could not find any parallels in all of our look, and I note that your terms of reference look around a bit, so I would be very keen to see whether there is anything that looks remotely like it, but being fairly new, unique and innovative legislation, we have adapted and refined our approach as we have learnt going along and it is certainly our intent to continue to do that. I am very open to refining the approach that we take as we get new and better information.

[2.45 pm]

The CHAIR: As I once wrote in a minority report, I personally am always very concerned about trying to politicise the position of the Auditor General, which I think is the other thing we always have to be cognisant of.

Mr Murphy: That is greatly appreciated, and I do take your point. We have been very conscious of the fact that the Parliament does have the capacity to regulate itself and to take action without necessarily requiring somebody independent to do that.

The CHAIR: I note your comment, and it is probably also my point of view, that the process that I outlined might be an appropriate way forward, and you would be very comfortable with that sort of approach. Unless there are any other questions on that particular matter I might move on to some of the other areas.

Hon PETER KATSAMBANIS: I would not mind asking a question, just for completeness and to have it on the record. In your normal auditing function, do you routinely audit compliance with section 82, or do you simply treat that as a ministerial obligation that you cannot audit in the usual course of either a financial audit, or a performance audit for that matter?

Mr Murphy: Look, probably the latter; it is not something that we routinely monitor. Certainly, compliance with legislation is well within my mandate. It is very open for me to monitor compliance of an agency or a minister with any legislation but, given how much there is and how many areas there are, I really have to devote my resources to areas of priority. As we have discussed, given the requirement for a minister to provide a notice, and given the Parliament's capacity to insist that ministers actually are complying with the legislation, it is not something I have devoted a lot of attention to. I would hasten to add that, on the understanding of the legal advice, I have no obligation to actually do that.

Hon PETER KATSAMBANIS: I am just contemplating something arising out of that. Is there something in the way the obligation is worded in section 82 that could be improved upon? Could the obligation be either expressed in a different way or placed as an obligation that is broader than the minister and the Parliament that could provide for better compliance?

Mr Murphy: I guess I could say a couple of things. Firstly, I am always reluctant to suggest amendments to legislation. I regard that as government's and Parliament's prerogative to determine what sort of policies and legislation it wants to put in place. In practical terms, the difficulties that

have arisen from section 82 would be its breadth. It is incredibly broad, which is different from the genesis which was around the Commission on Government and confidential information; the actual enacted provisions are incredibly broad. They require the issue of a notice. It is a legal requirement. Like the committee has, I regularly remind ministers that this is a legal requirement and it is supposed to happen. It should happen and we remind people that it should happen but the legislation is again silent on what action is to be taken if there is no notice.

The CHAIR: It is like the statement of corporate intent, other than reporting it, and we all know about that!

The next area that I wanted to turn to was obviously the legal opinion makes reference to the interaction of section 81, which is that ministers should not be entering into contracts that disallow government contracts or arrangements in such a way as to impose confidentiality even against the houses, is the word that Mr Walker used in his opinion. He then seeks to suggest that it is then a clear intent that that should be seen to be significantly limiting the occasions on which ministers will be able to cite commercial-in-confidence and that they should be providing them to the committee and, at the very least, they should be providing it to committees or to Parliament and potentially then asking that that information be kept confidential. Do you have any views or comments on that part of the advice?

Mr Murphy: I do. In some ways I am very pleased to see it because it is very consistent with our current practice. What he is saying is that circumstances where information is withheld from Parliament, because it is considered confidential, are extremely rare. He refers in paragraph 15 to saying —

> … where the commercial matters need to be kept secret in the public interest—usually, so as to preserve real competition for the public benefit … without the commercial counterparty itself having any right to insist on that secrecy.

That is absolutely 100 per cent consistent with the practice that we take. I was very pleased to see that identified in the opinion.

Section 81 has been around in its current form and in previous forms in Western Australian financial management legislation for an extensive period of time. It is a favourite clause, as I understand it, of people who are engaged in making commercial contracts in government procurement and of the State Solicitor's Office because every time a commercial party wants to put into a contract that all of their information will be kept secret, they are immediately pointed to section 81, which says this is actually not allowed under statute in Western Australia. We are very, very familiar with section 81, which does not allow public sector entities to enter into contracts with commercial parties which require keeping information away from the Parliament. I regard that as almost a threshold issue. I have an expectation that that will be the approach in our commercial dealings and in almost every case we have seen that ministers understand that. There have been exceptions. Where there are exceptions in looking at matters under section 24, if a minister is under some sort of misunderstanding that a contractual provision can prevent information going to Parliament, we do not take that into consideration at all. We would not allow that as a valid reason for withholding information from Parliament.

The CHAIR: I think there is an argument for people to consult with a third party, and that is not unreasonable. Certainly, I have seen a number of cases where it almost seems to be like the third party has requested that it be kept confidential and the agency says, "Well, that is why we keep it confidential."

Mr Murphy: We do have examples in our earlier opinions where a minister has said, "Under contract, I am required to keep this confidential", and we have said, "Not only is that not a valid reason, but if that is the case, you could well be in breach of section 81."

The CHAIR: I think Mr Walker goes a bit further to suggest that the interaction of sections 81 and 82 together would require ministers to have exceptional reasons to still maintain confidentiality. There is an expectation when you read the opinion as a whole that commercial contracts should be being released and that there is very little reason to be maintaining confidentiality.

Mr Murphy: Certainly as you outlined, I agree absolutely and I understand. I am not sure that I understand fully the linking in the legal opinion. I would be pleased to get a little better understanding of it. Certainly as you have outlined it, the exception that he has noted in the opinion is very clear to me and it is almost identical to the requirements that we subject matters to in determining whether it is reasonable or not for that information to be withheld.

The CHAIR: I noticed in one of our documents that we received the other day we were told we could not even get the annual payments that are required under the contract for the new stadium, which I would assume at some point will have to show in the budget papers. I am not sure how they ultimately intend that that should operate. Not only can we not get the clause of it but we cannot even see what the annual ongoing payments are that are required under the act. I find that bizarre. That is probably an issue that we should not go into because you may have to form an opinion on it at some point in the future.

You raised section 24, which obviously then brings in the issue around how you then assess if a minister has been reasonable and appropriate in their consideration of it. This is my summary of it and I am happy for you —

Mr Murphy: I am having less difficulty with your summation.

The CHAIR: Again, if you do not think it is a fair and reasonable summation of it. My summation would be that Mr Walker is suggesting that your practice statement and the way in which you assess it needs to be far more assertive in reaching your own conclusions about whether it is fair and reasonable rather than assessing whether or not the minister has gone through a fair and reasonable process in reaching their position.

Mr Murphy: I am very happy to address that. Firstly, one of the things that the opinion clearly identifies for me is the need for revisions to our practice statement. In reading through the practice statement, Mr Walker has reached the conclusion, for example, that some matters are predetermined or will be predetermined. That is absolutely not the case. Every single matter that is referred to me by a notice has been considered on its merits. When the legislation was enacted, as we discussed, there were no precedents, there was no guidance, there was no better practice to have a look at. We put a lot of effort into working on a practice statement to provide it to the Parliament and put it on our website in a very public way to try to identify a whole raft of issues that we saw in the legislation and to outline in quite some detail the approach that we were going to take in assessing those matters. In part, that was put there so that if anybody had a different view, they could let us know and we could amend our practice. Based on what I read, I am rather keen to amend some elements of the practice statement, as I said, particularly those that might indicate that matters are prejudged, which they are absolutely not. We go through a rigorous process of evaluating each one.

The breadth of section 82 was the major area that concerned us at the outset. When we watched the legislation going through the Parliament, it was referred to as confidential information—it was about commercial-in-confidence. When the legislation was enacted, it became very, very clear to us that we had no way of restricting the boundaries. It actually concerned any information. If a minister was asked about the colour of a shirt that somebody was wearing or how many pot plants were in an agency, that was information on which I need to provide an opinion. I was very concerned in the early days to try to put into the practice statement that the Auditor General was going to try to divert his resources to matters of substance and not inconsequential matters. One of the reasons for that is the legislation also imposed on me an obligation that does not exist with respect to matters like, for example, my performance examinations. I can undertake those examinations at my own discretion with full independence. Once I receive a notice under

section 82, I have no discretion; I must investigate it and I must report. I guess we were concerned at the time about being flooded with a whole raft of things that required a diversion of resources, some of which may not be matters of significance. For that reason, we went into a great amount of detail in our practice statement. I am pleased to say that the floodgate never eventuated. We have had some issues that required us to have 17 different notices and we have dealt with them but there has not been a flood. You can see from the statistics provided in my submission that we have not been overwhelmed with requests. I am more than happy to go back to the practice statement and both clarify and remove some unnecessary provisions from the practice statement.

The CHAIR: I appreciate that. Maybe as you develop that, you could keep the committee informed. As we progress through our inquiry, I am sure we would appreciate that. I understand that. One of the issues that we will need to come up with at the end of this is to make recommendations. If you have any suggestions on how section 82 might be improved so that matters of substance—I agree with you; again, things like pot plants, if it is across the whole of the government, might become a different issue or if it is systemic that there is an attempt to try to hide the number of pot plants that are sitting in government agencies, which can be a legitimate issue, or the volume of expenditure in one agency relative to others. It is hard to work out where something might be seen as frivolous in one circumstance but quite a serious legitimate issue in another. How might we be able to get that blend of, to some degree, still having the provision but also leaving it to your discretion? I do accept that a contract that goes to hundreds of millions of dollars and whether or not we can find out what the annual repayments are is a very different set of circumstances to $20 worth of pot plants or whatever it is. Sadly, pot plants are more expensive than that. I would be interested in any advice that you can give us about how that can operate. But I think there is also clearly in the opinion a view that there is a clearer obligation on you to be assessing whether it was reasonable and appropriate, particularly when it is, say, through a committee, where they would have the opportunity of providing it and requesting it to be kept confidential.

[3.00 pm]

Mr Murphy: There is a comment, and then perhaps a question. Certainly, the review of our reports, in my view, is to consider them more in a legal context than an audit report context. You are correct in that our reports do identify the process that a minister has gone through to get advice and it identifies what policies have been referred to, whether the agency involved gave good advice, whether they went and got legal advice and what they did. I would hasten to assure the committee that much of that is our endeavour to improve practice within the public sector, and I think we have done. I think we have seen an improvement within the sector. The reports of the Auditor General in my view—I mean, there is an obligation to do an assessment as to whether the minister's decision is reasonable and appropriate, and that is clearly headed in our reports as being "the opinion". We then report on what we did as an office, the process that we went through and whether we can see opportunities for improvement, and we do that to draw that to the attention of the Parliament and of other ministers and for public sector agencies. With this being in operation for some period now we have seen improvement as people get used to the idea. Initially they did not have good answers to our questions when we asked them what process they went through to get advice and how they documented things, but we have been back now to agencies and found that they have improved. Much of what we put into those reports is our endeavour to try to improve practice within the sector as distinct from the analysis that was used to determine whether the minister's decision was reasonable or not. A good example of that would be: we had a good look at tourism's policy, with respect to events, and their policy touched on all of the matters of public interest and procurement. It identified, for example, if an event was not likely to be poached by another jurisdiction. If it was an event that had happened some time ago, then there would be no justification whatsoever for withholding that information. But if it was a live event, with a very real threat of another jurisdiction poaching it and it met the criteria, then it could well be information that should be

withheld. So we did not say that following a policy was good practice. We had a look at the underlying practice, and the underlying policy and felt that it was useful guidance for a minister to take in, in making a decision, and we suggested that other agencies that are regularly dealing with this sort of information might well want to think about whether they developed a policy to assist them going forward.

The CHAIR: That could explain why tourism is now very good at providing the section 82 certificates, because they have come up with a set of reasonable arguments in terms of what—whereas the agencies that do not have them are the ones that are actually not even putting in the section 82 certificates.

Mr Murphy: I do take your point that the legal opinion is very, very clear on the obligation on the Auditor General to assess reasonableness outside of other considerations like information flows or policies, or the like.

The CHAIR: Any other questions on that?

Hon ALANNA CLOHESY: Just in relation to the notifications received that you have assessed, is the high number in 2007 simply because the two acts came into effect in that year, and then it falls off quite dramatically?

Mr Murphy: Yes it was. But there were cases where all ministers were asked a generic question and in those cases you get 17 questions, and if, as a cabinet, they have decided that they are not going to answer that particular question, then that results in a multiple. So I think that was a factor in 2007.

Hon ALANNA CLOHESY: Okay.

Mr Clarke: If I could just add, there has been a little bit of an uplift, just in the six months I think since we initially put in our submission back in June. Since then we have had nine notifications, so whether that is an anomaly, or whether it is part of a trend, I do not know.

The CHAIR: I think there might have been a change of government somewhere along there too. I am not making that in a facetious sense, I think that —

Hon ALANNA CLOHESY: No, I know. That is part of what I was going to ask, basically: what other factors can you see will have made those figures fluctuate in 2009 and 2013?

Hon RICK MAZZA: With those nine recent notifications that you received, what reasons were given for not supplying the information?

Mr Clarke: It varied, and it is probably similar to those we have had in the past, the tourism type, the forest—so it is confidential information, information being kept back for reasons of ongoing negotiations, those sorts of things. You will probably see more of the same sorts of reasons that we have seen in the past.

The CHAIR: I think there was a clear change in the way in which section 82 was interpreted, and as part of the way in which the act operated internally within government, as part of that change of government, in terms of submitting the section 82 certificates. Hopefully, when we have the State Solicitor's Office in, they might be able to give us an indication as to whether they gave new advice or what might have happened with the new government and when they should be provided. I think that is part of the problem, if we do not get the first stage of what we asked today; that is, if agencies do not believe that they will ever be brought to account for not submitting a section 82 certificate, then you are better off not submitting a section 82 certificate, never being held to account, and then if you ever do get caught you ask for forgiveness, not for permission. That is why my view is that that first part becomes so crucial to getting, as you talk about it, "good practice within government". Tourism has got that good practice, and it is interesting your use of tourism as an example, because that would explain why we do regularly see them coming from the Minister for Tourism, because they probably feel comfortable that they have now got their practices

right, whereas I think there are a large number of agencies that simply are not submitting the section 82 certificates and therefore have never sought to put in place that good practice regime.

Hon ALANNA CLOHESY: And may not even have the infrastructure within the agency to —

The CHAIR: I think it was a case of a few of them did not submit them, realised there were no consequences of not submitting them and sat back and went, "You beauty, that is the best way of getting out of this."

Mr Murphy: May well be the case.

The CHAIR: As I said earlier, as you adjust your practice statement, if you feel that there are adjustments that you make to that, it would be useful to be kept informed of those as part of this inquiry.

Mr Murphy: I would be pleased to.

The CHAIR: I think the other key issue is that you go through your own assessment that it is reasonable and appropriate rather than just relying on the ministers, which I think has been the impression that has often been given, so I appreciate your comments in that regard. That clarifies it. I guess the final issue that this opinion raises and to some degree—we have got the State Solicitor coming in after you—the question is the fact that you seek your advice through the State Solicitor who is also the advisor to the executive. We certainly intend to ask them the same question, but how do you assure yourself that the advice you are getting is independent, as is required for you as the Auditor General, of advice that may be beneficial to the executive, and is it a concern for you?

Mr Murphy: Look, I regularly garner advice from the State Solicitor and I am very comfortable in doing that, because the State Solicitor is also providing advice to ministers and to government agencies, so that happy place, if you like, of having a piece of legal advice that we can all rely on gives us a great deal of comfort. My legislation refers specifically to the capacity for me to seek advice from the State Solicitor. Having said that, I then hasten to add that the State Solicitor is not the sole provider of advice to our office; I do have the option to get advice from other sources should the need arise. If in any circumstance I see the need to get alternative advice from someone other than the State Solicitor, then I certainly have the capacity to do exactly that. There is nothing preventing me from doing that.

The CHAIR: So on something like this, would this be an area where you would see that there may be a benefit in getting alternative advice, because I would have thought there is obviously a clear conflict. The State Solicitor, when providing advice to the executive would be seeking to narrow down what section 82 means, as opposed to what—obviously that is one of the reasons we got our own advice as well, because we wanted to get a view from a legal opinion as to how section 82 and 24 should operate. Is this something that you would see as potentially an area that you maybe would need to get advice, because there is a conflict with the executive?

Mr Murphy: I would certainly be happy to take that one on notice; I would hate to give you a definitive response now. I am always open to considering getting alternative legal advice. Part of the issue for me, of having more than one legal opinion, is of course deciding where I go from there. If there is a sound reason, then yes, it is open to me to get other legal advice, and I would do so.

The CHAIR: Have there been examples in the past where you have sought separate legal advice?

Mr Murphy: No, I have not had the need. I note our practice statement refers to the Australian Government Solicitor in terms of their definition of confidential information, but no, I have not had circumstances where I have needed to. I have certainly had discussions with other solicitors who have said they would make themselves available if the need arose.

The CHAIR: The final issue for me—obviously I am not trying to interfere in your independence, but certainly from my point of view I am trying to help the committee get an understanding about a question that is asked in the Parliament, where, if an answer is provided, there is no choice but for

it to then become public. As part of that reasonable and appropriate test, the fact that they had the option of being able to provide it to a parliamentary committee, and request that information be kept confidential, is that something that you would see as a legitimate part of your assessment, or is that something that would not necessarily come into it?

[3.15 pm]

Mr Murphy: We certainly did look at that. In the report that is referenced in the legal opinion, we have quite clearly addressed that issue. We have asked the question of the Clerks. We have looked at the standing orders and asked the question: if information is provided to a committee, does that provide any certainty about the confidentiality of that information? The response we got was that there was no guarantee of confidentiality in those circumstances. Therefore, if the minister released the information, then the minister could have no certainty that the information would remain confidential. That is the matter that we addressed in the report. I would be more than happy to take it further or get different advice on that matter. But having been advised that there was no guarantee of confidentiality with providing information to a committee, we simply then turned our minds back to whether the information in question passed the public interest test that is outlined here.

The CHAIR: Right. That issue about section 81 giving a clear indication that commercial information should be made public, unless there is —

Mr Murphy: Unless it meets that specific test.

The CHAIR: — a public interest test. You went through some of them, that the contract is live or the events are still ongoing, but where a contract to procure something has occurred, have you had any examples where you have had those come before you and you have seen circumstances where there is an ongoing need to keep it confidential? One of the ones I find hard to get my head around is if you have already signed a contract and locked in the price, even if you are building a school and you might come back and build another school in a couple of years' time, I cannot see why that information could not be made public. The only public interest is that potentially other bidders might sharpen their pencil.

Mr Murphy: I agree with you. In normal circumstances, that would not be a justification for keeping anything confidential. The one that springs to mind—I will see if my deputy can help me—was a Main Roads contract, which was one in a series that was happening at the time. Main Roads indicated to us that they had something in the order of 10 procurements proceeding. Until that series of procurements had completed, they were reluctant to release information about the first one, if you like. That seemed to me to be a reasonable basis because they had a time line. They were not saying it was confidential forever; they were just saying "until we have completed these negotiations with the private sector" and that seemed to me to be a reasonable basis for keeping the information confidential for a specific period of time. I accept your view absolutely, Chair, in the normal course of events. I think government procurement requires that once government has entered into a contract, in the absence of any other public interest test, the details of that procurement should be public.

The CHAIR: There was one the other day where I saw the debate about hourly rates of a contract being kept confidential. Again, I cannot imagine how a contract that lasts for 10 years will have a negative impact on public interest. I am trying to find some examples, if there are any, of where there could be a legitimate reason for keeping that contract confidential.

Mr Murphy: Some of the literature refers to the commercial secrets of the party. If disclosing profit margins and those sorts of things can be demonstrated, then there would be an argument. There is always an argument that if you disclose too much of the intellectual property of proponents, people may be reluctant to do business with government, but, by and large, prices, values and rates, should be disclosed. I think it has become increasingly the trend in public sector procurement over the years. Less secrecy is seen in most jurisdictions as the way to go.

The CHAIR: I guess in that sense, one of the fears I have always had is drawing yourself, as an independent officer, into a political debate in the Parliament about some of these matters. Are you aware of anywhere in the world where there is constant disclosure regimes around government contracts so that as they are signed, they are made public, which would then take you out of the debate? Rather than having the clauses we have, we would have a far more open process of disclosing information. It may be by culture rather than legislation, but it never ceases to amaze me the number of reports done for government about the operations of elements or planning documents and the like—not planning as in a town planning sense, but broad planning documents—that in other jurisdictions are made public as a matter of course but in Western Australia, and probably Australia, we have a tendency to keep confidential. Likewise, contracts are kept confidential almost unless we force them. Even now we have a regime where under the state supplier, the big contracts are made public, but, as I say, in the most recent one they made public, in my view any meaningful information about the financial details of that contract have been deleted out of it, so that you have no idea what the value of that contract is or any of the elements of it.

Mr Murphy: I am not aware off the top of my head. I would be more than happy to look at it from a personal interest point of view as well as the interests of the committee. I do recall references from people in the US about the signing of a contract being followed by the starting up of the printing presses because that was the practice that once a contract had been signed with the public sector, multiple copies of the document had to be made available. This was probably before the web. The federal Auditor-General certainly has a role in going through all the government contracts at least once a year and identifying any cases where clauses are overly restrictive, and publishes them on a regular basis. That was part of the examination we did in looking for better practice in terms of commercial-in-confidence.

The CHAIR: I must say, I think one of the great ironies it was off—in fact, at one point we were even referred to a US website to obtain a Western Australian government contract. We were referred to the website, but they still would not give us a copy of the contract, which I found quite ironic, to be honest—almost comical at times. If in any of your research—I do think that may be part of the solution too—you try to find some regimes where there is automatic disclosure of contracts as opposed to —

Even with briefings that are kept confidential within parliamentary committees and the like. I will put this as a question to you. If we were to establish our own practices that made it clear that even if we receive a document, yes we have a right to publish it, but we would then go through our own processes, which, certainly in my experience on this committee has always involved getting ministers or their representatives in before the committee to negotiate with them what should or should not be made public where we have been given a contract or any document and been asked to keep it confidential and we do not see the reasoning behind keeping it confidential. In the case of the Oakajee state development agreement, the committee continued to keep that agreement confidential. With other documents, we have negotiated the release of parts of them and kept parts of them confidential. If we were to have our own practice statements, is that something that might come to bear on your earlier comments about how you might then assess what is reasonable and appropriate in the terms of keeping confidential , on which we would be following due process?

Mr Murphy: It certainly would. I have to say that I was much more comfortable with an obligation to look at the information, which is where the legislation started, which is to say Parliament cannot see the information it cannot see and it would like somebody else to look at that information and its nature and just provide advice back as to whether it met the tests or not. I am much more comfortable with that than making further judgements, if you like, particularly when they involve the operations of Parliament and its committees. If the statute requires me to do these things, then I have an obligation—I have sworn—to meet the requirements of the legislation, and I will do my best to do that.

The CHAIR: To finish off, obviously we have provided you with a copy of the Walker opinion. Is that something you will now take further advice on and is it something you will get from the State Solicitor on or are you likely to try to get some independent advice?

Mr Murphy: In the first instance, I certainly am very, very keen to have advice from the State Solicitor, particularly where there appears to be a gap between the two so that I can understand the differences. Following that, I will certainly consider the need to get other advice.

The CHAIR: Obviously, we realise it has been only a week since we provided it to you or possibly less than a week since you would have received that—I think a couple of hours short of a week. I realise that is a short space of time to go through an opinion like that and fully understand it and interpret it. As you give further consideration to that, I would welcome your further advice as to, firstly, the changes you are making, but, secondly, if there are points that you believe do not fairly state your position or where you have a difference of opinion in terms of the conclusions that are being reached, we would certainly be happy to engage with you as that matter progresses, in your consideration of it as well.

Mr Murphy: I would welcome that, thank you.

The CHAIR: Thank you again for your evidence before the committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence.

As I say, we will make very clearly an uncorrected version available on our website. Thank you very much for your time today.

Mr Murphy: Thank you very much for your time; we appreciate it.

Hearing concluded at 3.26 pm

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