

Western Australian Auditor General's Report



Disclaimer of Opinion on Ministerial Notification – Bushfire Centre of Excellence



Report 32: 2020-21

23 June 2021

**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

Disclaimer of Opinion on Ministerial Notification – Bushfire Centre of Excellence



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

DISCLAIMER OF OPINION ON MINISTERIAL NOTIFICATION – BUSHFIRE CENTRE OF EXCELLENCE

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

It deals with a decision by the former Minister for Emergency Services; Corrective Services, the Hon Francis Logan MLA, not to provide Parliament with a briefing note on the Bushfire Centre of Excellence.

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

CAROLINE SPENCER
AUDITOR GENERAL
23 June 2021

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Auditor General's overview

Recently, I have reiterated how the principles of transparency and accountability are fundamental to good public governance in a parliamentary democracy.¹

In our Westminster system, responsible government is open and accountable to the people. This is reliant on the government providing information to Parliament, wherever possible. Sections 81 and 82 of the *Financial Management Act 2006* support this principle, and it is the long-held position of my Office that, by default, Ministers should disclose information to Parliament wherever it is not contrary to the public interest.

When a Minister provides a section 82 notice, it triggers my duty under the *Auditor General Act 2006*² to provide Parliament with an impartial and independent view of whether a Minister's decision to not provide information was reasonable and appropriate. My role acts as a safeguard for Parliament. To do this, my Office views the information requested by Parliament and considers the reasonableness of the Minister's decision.

In the current case, the document requested by Parliament was a briefing note related to the Bushfire Centre of Excellence. The briefing note was the subject of a section 82 notice from former Minister Francis Logan and was therefore central to our inquiry. Following initial enquiries with the Department of Fire and Emergency Services, the Minister's Office provided us access to a heavily redacted copy of the briefing note. However, we were not permitted to view an unredacted copy and could not determine what had been redacted. My Office made it clear to Minister Logan's Office that without the ability to view all of the document I could not provide an opinion on whether it is reasonably covered by the public interest immunity of Cabinet confidentiality.

It is regrettable that I need to issue a Disclaimer of Opinion for this section 82 inquiry. However, such outcomes are likely when I cannot access all the information I need to carry out my statutory responsibility. While Ministers have generally provided access to such information, this is the fourth time since 2007 where a Disclaimer of Opinion by the Auditor General for a section 82 notice has been necessary.



¹ Western Australian Auditor General's Report, *Opinion on Ministerial Notification*. Report 14: 2020-21.

² *Auditor General Act 2006*, Section 24 (2c), 'is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate'.

Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the former Minister for Emergency Services; Corrective Services, the Hon Francis Logan MLA, not to provide Parliament with a briefing note on the Bushfire Centre of Excellence.

Section 82 of the *Financial Management Act 2006* (the 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 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 State government entity documents
- a review of any advice provided to the relevant Minister by entities
- 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.

Disclaimer of Opinion

An opinion cannot be formed on whether the former Minister's decision not to provide information to Parliament was reasonable and therefore appropriate, as the OAG has been unable to obtain sufficient and appropriate evidence.

The former Minister provided the OAG access to view a copy of the briefing note requested in the Parliamentary question. However, nearly all of the document we viewed was redacted. The former Minister's Office declined our subsequent requests to examine an unredacted copy. Having access to the complete briefing note is fundamental to our inquiry and without it there is insufficient information on which to base an opinion.

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. If an auditor is unable to obtain sufficient appropriate audit evidence, they have few options. One of these is to issue a Disclaimer of Opinion. While this is the only time my Office has issued a disclaimer against the former Minister, it is the fourth occasion where the OAG has been placed in this position for an opinion on a section 82 notice since these provisions came into effect in 2007.

Background

In Parliament on 2 April 2019, the Hon Donald (Terry) Redman MLA asked the former Minister for Emergency Services; Corrective Services in Legislative Assembly Question on Notice 4964 for information relating to the Bushfire Centre of Excellence. The question was:

I refer to the Bushfire Centre of Excellence, and ask:

- (a) How many tender applications were received by the Department of Fire and Emergency Services (DFES) for this facility;*
- (b) Can the Minister list the tender applicants;*
- (c) How many applications were deemed 'not' eligible based on tender criteria;*
- (d) Can the Minister list the final eligible tenderers;*
- (e) Was there a short list of applicants with a recommendation from DFES:*
 - (i) If yes, which applicants were on the shortlist and which applicant was recommended by DFES; and*
- (f) Did the Minister receive a briefing note with advice on the recommended applicant/s:*
 - (i) If yes, will the Minister table the briefing note?*

On 9 May 2019, the former Minister responded:

- (a) A total of thirteen (13) eligible submissions were received to the Request for Proposal – Selection of the Location for the Bushfire Centre of Excellence 1795/18.*
- (b) The request for proposal is not a formal tender process. The detail of the submissions will not be publicly released as they formed a part of the deliberations of Cabinet.*
- (c) All applicants received were assessed against the Request for Proposal criteria.*
- (d) As per response to (b).*
- (e) As per the selection process outlined in Section 2.1 of the Request for Proposal document, DFES developed a shortlist of potential sites.*
 - (i) As per response to (b).*
- (f) (i) The Cabinet submission and any accompanying documents will not be released as they formed a part of the deliberations of Cabinet.*

On 23 May 2019, the Auditor General received the former Minister's notification of his decision not to provide the requested information in part (f) of Legislative Assembly Question on Notice 4964 (a briefing note), in accordance with section 82 of the FM Act.

Basis for Disclaimer of Opinion

The former Minister properly sought advice from the Department of Fire and Emergency Services (DFES) in answering the question. DFES provided the former Minister with a draft response.

Following lengthy enquiries, initially with DFES and then the Minister's Office, we were not provided with the full briefing note that was the subject of the section 82 notice. The former Minister's Office told us the briefing note supported a Cabinet submission and we requested access to both the submission and the briefing note. We were granted access to view the Cabinet submission, however, we were only provided with a heavily redacted (roughly 85%) version of the briefing note. The portions we could see did not enable us to make an assessment on whether Cabinet-in-confidence applies. As the former Minister's Office has refused our request for a full and unredacted copy, we are unable to form an opinion.

Response from former Minister Logan

I note that the Auditor General has issued a disclaimer of opinion. The Auditor General notes in her summary that it is a serious matter to issue a disclaimer of opinion. I do not dispute that the proper performance of the role of the Auditor General is an important one. However, the proper recognition and protection of Cabinet confidentiality is also a serious matter. Ultimately, what this comes down to is a question of whether the Auditor General has the power under the *Auditor General Act 2006* to compel the production of documents to which public interest immunity applies, including Cabinet in confidence materials. On the words of the statute, she does not. That view, which underpins my response here, is not a new one, and in fact has been acknowledged in a number of inquiries and reports including by the former Auditor General in his comments that are incorporated in the Final Report of the Special Inquiry into Government Programs and Projects. In the absence of a legal power to compel the production of cabinet materials, their provision of those materials to the Auditor General may have a deleterious effect on the maintenance of fundamental common law privileges and immunities.

My Ministerial Office made a number of attempts to engage meaningfully with the Auditor General in relation to this matter over an extended period of time, including to attempt to overcome the issues identified above. It was not until recently that those offers of assistance were taken up, and the Auditor General maintained the position that only a full unredacted copy of the documents would suffice, even when further information was provided as to what was contained in certain parts of the document.

While this outcome is unfortunate, it is one that my officers and I worked to avoid. I maintain that my decision not to provide cabinet in confidence materials to Parliament was reasonable and appropriate. Cabinet confidentiality is fundamental to our system of Government and it is my duty to protect it appropriately.

Comment in response from Auditor General

I have considered the concerns the former Minister has expressed regarding his experience interacting with our Office during this process. We are always keen to improve our processes and we have implemented changes where relevant.

Regarding access to Cabinet materials, I wish to reiterate that I support the principle of Cabinet confidentiality and do not seek to undermine this important aspect of our Westminster system of responsible government. However, I retain the view that the intent of the AG Act, and the provisions outlining information gathering powers in sections 34-37 in particular, is to enable the Auditor General to access such material when there is a legitimate need for them to do so. This is made clear in paragraph 59 of the Act's supporting Explanatory Memorandum:

The clause [Clause 35] ensures that the Auditor General has the power to access all information necessary for the performance of his or her functions. Access to Cabinet documents would be available and claims of legal professional privilege would not be maintainable.

Indeed, there are long established protocols in place to enable my Office to view Cabinet-in-confidence materials including the relevant Cabinet submission which was viewed in full during this inquiry. Such access is important and Auditors General across Australasian jurisdictions, and beyond, access Cabinet material as needed in order to discharge their duties. It is unclear how access to certain relevant information by my Office in this case could have posed a risk to the principles surrounding Cabinet confidentiality.

Furthermore, I fundamentally refute the view that heavily redacted documents provide sufficient appropriate evidence for me to provide a fully informed independent opinion. If Parliament wishes me to perform this section 82 function, I must be able to examine, in full, the information that Ministers have decided not to provide to Parliament. This information is primary evidence in the discharge of my statutory assurance duties, and most particularly when providing an opinion on a section 82 notice.

To avoid such misinterpretation, the Government has previously supported clarifying the access granted by the AG Act, following recommendations in Parliamentary reports.^{3,4} The Government's response to the recommendations of the 2018 report of the *Special Inquiry into Government Programs and Projects* committed to 'extend[ing] the powers of the Auditor General to enable access to Cabinet documents and documents subject to legal professional privilege'.⁵

While clarification of my current powers under the AG Act may be beneficial, I retain the view that these powers are inherent. However, I acknowledge that there remains conjecture on this point that may see the OAG continue to encounter difficulties. Until this issue is resolved, I will continue my work to provide Parliament with impartial and independent assurance opinions on matters that come before me and I will report accordingly whenever I cannot.

³ The Parliamentary Joint Standing Committee on Audit, *Review of the operation and effectiveness of the AG Act*, 2016.

⁴ Estimates and Financial Operations Committee, *Inquiry into the Provision of Information to Parliament*, 2016.

⁵ McGowan Government media release, *McGowan Government Response to the Special Inquiry Implementation Program*, 2018.

Auditor General's 2020-21 reports

Number	Title	Date tabled
31	Improving Prisoner Literacy and Numeracy	23 June 2021
30	Audit Results Report – Annual 2019-20 Financial Audits of Local Government Entities	16 June 2021
29	Information Systems Audit Report 2021 – State Government Entities	16 June 2021
28	Western Australian Public Sector Financial Statements – Better Practice Guide	14 June 2021
27	Opinion on Ministerial Notification – Port Agreements	11 June 2021
26	Audit Results Report – 2020 Financial Audits of Universities and TAFEs	2 June 2021
25	Delivering Essential Services to Remote Aboriginal Communities – Follow-up	2 June 2021
24	Opinion on Ministerial Notification – DPIRD Capability Review	18 May 2021
23	Local Government General Computer Controls	12 May 2021
22	Opinion on Ministerial Notification – Hospital Facilities Services	6 May 2021
21	Regulation and Support of the Local Government Sector	30 April 2021
20	Opinions on Ministerial Notifications – Policing Information	28 April 2021
19	Opinion on Ministerial Notification – Bennett Brook Disability Justice Centre	8 April 2021
18	Regulation of Consumer Food Safety by the Department of Health	1 April 2021
17	Department of Communities' Administration of Family and Domestic Violence Support Services	11 March 2021
16	Application Controls Audits 2021	9 March 2021
15	Opinions on Ministerial Notifications – Tax and Funding Information Relating to Racing and Wagering Western Australia	26 February 2021
14	Opinion on Ministerial Notification – Hotel Perth Campaign Reports	24 February 2021
13	Opinion on Ministerial Notification – Release of Schedule of Stumpage Rates	24 February 2021

Number	Title	Date tabled
12	Grants Administration	28 January 2021
11	COVID-19 Relief Fund	21 December 2020
10	COVID-19: Status of WA Public Testing Systems	9 December 2020
9	Western Australian Registry System – Application Controls Audit	26 November 2020
8	Regulating Minor Pollutants	26 November 2020
7	Audit Results Report – Annual 2019-20 Financial Audits of State Government Entities	11 November 2020
6	Transparency Report: Major Projects	29 October 2020
5	Transparency Report: Current Status of WA Health's COVID-19 Response Preparedness	24 September 2020
4	Managing the Impact of Plant and Animal Pests: Follow-up	31 August 2020
3	Waste Management – Service Delivery	20 August 2020
2	Opinion on Ministerial Notification – Agriculture Digital Connectivity Report	30 July 2020
1	Working with Children Checks – Managing Compliance	15 July 2020

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