



**CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**Report on the Investigation into
the Department of Treasury and Finance:
Suspected Misconduct Concerning the Unauthorised Release of
Treasury Information**

June 2005

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Square, St George’s Terrace, Perth WA 6850.

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and Crime Commission can be found on the
Commission’s website at www.ccc.wa.gov.au

Corruption and Crime Commission

ADDRESS	186 St George’s Terrace PERTH WA 6000
POSTAL ADDRESS	PO Box 7667 Cloisters Square PERTH WA 6850
TELEPHONE	(08) 9215 4888 1800 809 000 (toll free, for callers outside metropolitan Perth)
FACSIMILE	(08) 9215 4884
EMAIL	info@ccc.wa.gov.au
OFFICE HOURS	8.30 am to 5.00 pm, Monday to Friday



CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

Hon Nicholas Griffiths MLC
President
Legislative Council
Parliament House
PERTH WA 6000

Hon Fredrick Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with section 84 of the *Corruption and Crime Commission Act 2003* I am pleased to present the report of the Corruption and Crime Commission of an investigation into alleged misconduct concerning unauthorised release of state budget information.

The opinions contained in this report are those of this Commission.

I recommend that the report be laid before each House of Parliament forthwith pursuant to section 93 of the *Corruption and Crime Commission Act 2003*.

Yours sincerely

Kevin Hammond
COMMISSIONER

10 June 2005

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1.0 Chapter 1 – Background to this Report

1.1 What is this Report About?

On 10 September 2004 the Corruption and Crime Commission of Western Australia (the Commission) received, from the Department of Treasury and Finance (DTF), a complaint of suspected misconduct concerning the unlawful and unauthorised disclosure of official information by an unknown entity, to a third party, resulting in the premature publication of the State Government Budget surplus in *The West Australian Newspaper (The West)*. The substance of the complaint was that on 10 September 2004 an article by journalist Mark Drummond published in *The West* detailed extensive information relating to the impending State Budget surplus. The published information, *2003-04 Government Financial Results Report*, included facts and figures and a lengthy quotation. The release date for this information, as set by the Treasurer, was to have been 13 September 2004.

The Commission has conducted an investigation into this allegation to determine if any misconduct (as defined in the *Corruption and Crime Commission Act 2003* (the Act), refer to the extract at Appendix A) has occurred. This report details the Commission's investigation including the assessments and opinions it has formed in accordance with s.22 of the Act and, recommendations based on its assessments and opinions in accordance with s.43.

1.2 Receipt of the Complaint to the Corruption and Crime Commission

On 14 September 2004 the complainant, Mr Timothy Marney, Acting Under-Treasurer DTF, attended the office of the Commission, where he spoke to investigators about the alleged unlawful disclosure of State budget information.

Following the discussion with Marney, an assessment was carried out in relation to the alleged unauthorised disclosure. Of particular concern to DTF is the fact that the unauthorised disclosure of 10 September 2004 was not an isolated incident. For example, on 5 May 2004 *The West* included an article titled – *Revealed: tomorrow's vote-buying budget* (page 1) with a

subsequent report on page 8 discussing the leaked information further.

After assessing the matter, the Commission decided to investigate, pursuant to s.33 (1)(a) of the Act.

1.3 Jurisdiction

Allegations of misconduct on the part of an officer of DTF fall within the jurisdiction of the Commission for the following reasons:

- Section 18 of the Act, requires that the Commission ensure that an allegation about, or information or matter involving misconduct is dealt with in an appropriate way.
- Section 4 of the Act defines those actions on the part of public officers that constitute misconduct and s.6 states that the Commission may receive information and otherwise perform its functions in relation to acts, omissions or conduct alleged to have been done, omitted or engaged in by a person who was a public officer at the time of the alleged acts, omissions or conduct, even if the person has ceased to be a public officer; and
- The term public officer is defined in s.3 of the Act by reference with s.1 of *The Criminal Code* to include a public service officer or employee within the meaning of the *Public Sector Management Act 1994*.
- An officer of DTF is an employee within the meaning of the *Public Sector Management Act 1994* and is therefore a public officer under the Act.

The allegations made by DTF, fall within the jurisdiction of the Commission, and would constitute serious misconduct pursuant to sections 4(a)(b)(c)&(d)(iv) of the Act.

1.4 Criminal Liability

The investigation has identified a possible criminal offence pursuant to s.81 and s.83 of *The Criminal Code 1913*.

Section 81 of *The Criminal Code* prohibits unauthorised disclosure, by a person employed in the public service, of official information which it is their 'duty' to keep secret and carries a penalty of two years' imprisonment. The State budget information would fall within this criterion.

However, neither the *Criminal Code* nor the *Public Sector Management Act 1994* (PSM Act) is explicit as to when a 'duty' exists which makes prosecutions under this section difficult.

For example, public officers give out information to the public and others every day but the limits of 'duty' to keep official information secret are not specified.

Section 83 of *The Criminal Code* prohibits a public officer acting on knowledge or information obtained by way of their office so as to cause benefit or detriment to any person. If it were established that the information was provided to the newspaper for profit or other benefit, this section could apply though there is no evidence that was a motivation in this instance.

Should it not be possible to prosecute under the *Criminal Code*, it may still be possible to pursue a breach of the *PSM Act*.

1.5 Other Possible Breaches

Through its general principles of public administration, ss.7 – 9 of the *PSM Act* makes unauthorised disclosure of information a possible breach of discipline.

Under s.9, employees of the public sector are to act with integrity in performing their duties and are to be scrupulous in the use of official information.

A breach of these provisions constitutes a breach of discipline under s.86 with penalties up to and including termination of employment.

Although the staff at DTF and Ministerial offices who handled the documents are public sector employees under the PSM Act, others such as the Treasurer and contractors providing a service are not.

DTF's Code of Conduct is clear both with regard to dealing with media (part 5.1) and confidentiality (part 5.3). Any departmental officer who provides documents to a media outlet without permission, particularly documents of such sensitivity as state budget details, would be committing a serious breach of discipline pursuant to s.80 of the PSM Act.

The penalties for a serious breach of discipline include dismissal of the officer (s.86 PSM Act) and as such the alleged conduct would fall within the jurisdiction of the Commission, and would constitute serious misconduct pursuant to sections 4(a)(b)(c) & (d)(iv) of the Act.

Public Sector Management Administrative Instruction 711 prohibits the disclosure, by officers, of official papers or documents or information relating to Crown business without the express approval of the CEO. However, this instruction is so broad that a successful prosecution is unlikely.

1.6 Difficulty of Prosecution

Therefore, the Commission has concluded that there is not an adequate legislative base for the prosecution of persons involved in the unauthorised access and disclosure of official information.

2.0 Chapter 2 – The Investigation

2.1 Scope of the Investigation

The Commission's jurisdiction is limited to dealing with misconduct by public officers, as defined by s.4 of the Act. It does not extend to dealing with the conduct of privately employed people, such as staff members employed by *The West Australian* newspaper.

Therefore its inquiries focused on identifying:

- (a) whether any public official(s) have engaged in misconduct;
- (b) whether any public official(s) have engaged in any improper or criminal conduct; and
- (c) what policy guidelines or advice could be made to improve the integrity of, and reduce the incidence of misconduct in the public sector.

2.2 Use of the Commission Powers

The following Section 95 "Notices to Produce Documents and Other Things" under the Act were issued during this investigation:

- October 2004: The Department of Treasury and Finance to provide documentation and or information relating to the obligations of the Department of Treasury and Finance employees in respect of the use of official and or confidential information.
- 25 October 2004: The Department of Treasury and Finance, Executive Officer to the Treasurer, to provide records of all calls made from the Department of Treasury and Finance for the period of 15 April – 15 May 2004 and 1 – 10 September 2004 respectively.
- 25 October 2004: The Department of Treasury and Finance, Executive Officer (Executive Support) to provide records of all calls made from the Department of Treasury and Finance for the period of 15 April – 15 May 2004 and 1 – 10 September 2004 respectively.

2.3 Interviews Conducted by Commission Investigators

The following employees of the Department of Treasury and Finance were interviewed during the course of the investigation:

- Mr Timothy Marney, Acting Under Treasurer;
- Mr Michael Barnes, Director Fiscal Strategy;
- Ms Sonya Monterosso – Personal Assistant Fiscal Strategy;
- Ms Marny Matthewson – Principal Financial Analyst;
- Ms Valeri Jayasinghe – Assistant Director Reporting;
- Mr Michael Barbaro – Manager Fiscal Analysis & Budget;
- Mr Chris Wright – Assistant Director, Fiscal Analysis & Budget;
- Mr Jim Vanopolous – Principal Policy Advisor (Treasury Department);
- Mr David Smith – Executive Director (Economic);
- Mr Rodney Torrens – Liaison & Policy Officer (Energy); and
- Mr Darren Foster – Media Advisor to the Treasurer the Hon Eric Ripper MLA.

3.0 Chapter 3 – The Investigation Outcome

3.1 Intervention

In the course of the investigation the Commission became aware of flaws in DTF's management of information. Because of the significance of those flaws the Commission recommended that DTF immediately engage an independent external risk management consultant to assist in the immediate implementation of document control procedures in order to reduce the risk of further releases of confidential information.

DTF enlisted GHD Security Group (GHD) to undertake an immediate review. The matters raised by GHD were similar to those concerning the Commission's investigators. They related to the management and security of information and the appropriate vetting and security clearance of personnel. GHD provided an immediate response to DTF outlining short-term, medium-term and long-term strategies for the prevention and detection of security breaches. DTF implemented many of these recommendations immediately.

3.2 Assessment

Although there was serious misconduct in this case, the Commission's investigation was unable to identify the source of the information leak.

However, the evidence gathered reflects the need to address inadequacies in policy, procedures and relevant legislation involving the handling and management of official information.

The DTF's Code of Conduct is clear.

Any departmental officer who provides documents to a media outlet without permission is committing a serious breach of discipline the penalties for which might include dismissal. However, it was established that the Treasurer's Office might, prior to an official budget release, arrange the release of a limited amount of information (a controlled leak). This practice is not unique to Western Australia but the fact that some leaks of official information are acceptable can confuse the issue on when public officers should or should not release information.

Commission investigators did not find staff selection, induction and supervision practices consistent with the safe handling of sensitive and confidential information. DTF does not have adequate security vetting of its staff and although it does have a Code of Conduct, the Commission did not find that many staff knew about it or had been reminded of their responsibilities under it.

Commission investigators found that DTF did not have in place effective practices for the handling and management of confidential information. There was little control of access to documents and no system to track their use.

4.0 Chapter 4 – Opinions and Recommendations

This chapter identifies the opinions the Commission has formed as a result of its investigations and makes recommendations to address them.

A number of issues highlighted in this investigation have application across many public sector agencies. Many of these will be addressed in greater detail in the Commission's forthcoming '*Report of an Inquiry into Unauthorised Access and Disclosure of Confidential Personal Information*.'

4.2 Legislation and Policy

The investigation highlighted the difficulties in establishing misconduct under the Act, or a breach of discipline under the PSM Act, or an offence under ss.81 - 82 of *The Criminal Code*. It is the view of the Commission that this legislation and the policy governing them be reviewed.

4.3 Section 81 of The Criminal Code

Whilst s.81 encompasses employees of DTF, it does not include many others who have access to confidential government information. Employees and members of non-SES organisations are excluded from these provisions. This means that s.81 does not cover state MPs and local government councillors, local government employees, police officers, university staff and employees of corporatised bodies such as port authorities, Western Power and the Water Corporation. Consideration needs to be given to amending s.81 to bring these within its ambit.

Problems also arise in determining when a duty not to make a disclosure might arise, as *The Criminal Code* does not address this point. It is necessary to define the parameters of this duty. This might be achieved by codes of conduct or the inception of a public sector oath to clarify the duty not to disclose.

Recommendation 1:

It is recommended that s.81 of *The Criminal Code* be amended to include non-SES organisations.

Recommendation 2:

It is recommended that codes of conduct be modified to specify a particular duty not to disclose corporate or confidential information inappropriately.

4.4 Administrative Instruction 711

Administrative Instruction 711, which took effect in 1989, prohibits an officer from disclosing information except in the course of official duties and with express permission of the relevant Chief Executive Officer. Where it is not possible to satisfy the burden for establishing a criminal offence, breaching this Instruction could be used to substantiate a disciplinary offence under s.80 of the PSM Act. However, the blanket nature of this Instruction casts doubt on its validity, as it is so broad. It is questionable whether a successful disciplinary offence could be substantiated¹. It is the view of the Director General of the Department of Premier and Cabinet² that this Instruction should be repealed when a suitable alternative Instruction is available to replace it.

Recommendation 3:

It is recommended that Administrative Instruction 711 be repealed and replaced with a more specific and relevant Instruction.

¹ See WA Inc Royal Commission, Commission on Government and *Bennett v President, Human Rights and Equal Opportunities Commission* [2003] FCA 1433

² See Correspondence of 10 December 2004 – submission to the public inquiry into *Unauthorised Access and Disclosure of Confidential Personal Information*.

4.5 Section 80 of the PSM Act

Should a suitable replacement for Administrative Instruction 711 have been available, there remains doubt as to the successful substantiation of a disciplinary offence under the provisions of s.80 of the PSM Act. It is generally accepted by a succession of reviewers³ that the statutory arrangements are overly prescriptive and too procedurally focused, such that they are not conducive to dealing with disciplinary breaches.

Recommendation 4:

It is recommended that the disciplinary provisions of the PSM Act be repealed and replaced with provisions that are more in keeping with normal contracts of employment.

4.6 Selection, Induction and Codes of Conduct

Inadequate staff selection, induction and supervision practices increase the risk of behaviour detrimental to the effectiveness and reputation of an agency such as DTF. To minimise the risk of such occurrences, DTF should implement appropriate staff selection, induction and ongoing training processes that will screen out candidates who might present an unacceptable risk and remind current employees of their responsibilities.

The induction period is a crucial link between the recruitment and selection of an individual and their work as a motivated and competent employee. A well planned, employee focused induction should emphasise the legal framework in which DTF operates and the importance of constant attention to the values of the department.

A thorough induction process must be reinforced by careful supervision so that DTF staff are always aware of the department's values and mindful of the significance of their work.

Recommendation 5:

In order to ensure adequate selection, induction and training of staff DTF should:

- Conduct pre-employment screening or security vetting commensurate with each new employee's access to confidential information;
- Develop an induction program to cover not only administrative and procedural matters but also the confidential and politically sensitive nature of their business. Attention should be paid to the department's Code of Conduct;
- Screen existing employees to ensure they have the appropriate level of security clearance;
- Ensure that contracts of employment specify a duty not to disclose protected or confidential information (a secrecy provision);
- Require all staff to undertake an oath or affirmation, clarifying the duty of officers to maintain secrecy; and
- Have in place adequate supervision mechanisms that ensure that staff are fully aware of their duty to maintain confidentiality.

³ Fielding Report (1996), Kelly Review (1997), Whitehead Report (2004)

4.7 Authorised Release of Information

DTF's policy on the release of documents to the media is clear, however, practice does not always follow policy. Prior to revealing a budget, the Treasurer's Office might arrange the authorised release of a limited amount of information (controlled leak) to the media. There are many reasons for this practice. Although not officially acknowledged as a release, such a leak might allow the public more time to come to grips with a complex budget or it might lessen the impact of a dramatic announcement.

It is understood that there are currently no written policies or procedures on the authorised release of information. In the Commission's opinion, this lack of policy undermines public sector confidentiality and accountability and creates uncertainty for employees.

Recommendation 6:

To enable the strategic release of information without undermining public sector accountability and confidence it is recommended that DTF develop and apply clear, concise and well-communicated policy and procedures on the release of information to the media.

4.8 Handling and Management of Confidential Information

It is important that agencies have in place information technology systems and procedures to minimise the risk of unauthorised access to, and misuse of, corporate and confidential information. In the Commission's opinion, the decision by DTF to engage risk management consultants to give immediate advice was a sensible one. However, while some of the more immediate recommendations have been implemented, more long-term strategies need to be considered.

The following public standards would provide an effective base for the development of organisational security standards and effective security management practices suitable for a department such as DTF.

- The Organisation of Economic Co-operation and Development (OECD) *Guidelines for Security of Information Systems and Networks (2002) – Towards a Culture of Security*. These guidelines identify nine principles of information security dealing with the issues of accountability, awareness, ethics, multidisciplinary, proportionality, integration, timeliness, reassessment and democracy.
- Standards Australia & New Zealand Standards, 2004, AS/NZS 4360:2004 Risk management (*the Risk Management Standard*).
- Standards Australia & New Zealand Standards, 2004, HB: 4360:2004 Risk management (*the Risk Management Guidelines*).
- Standards Australia & New Zealand Standards, 2001, AS/NZS ISO/IEC 17799:2001 Information technology – *Code of Practice for Information Security Management* (the Standard Code of Practice).

Recommendation 7:

It is recommended that DTF review current organisational security policies, procedures and systems and develop new policies, procedures and systems in line with AS/NZS ISO/IEC 17799:2001 Information technology – Code of Practice for Information Security Management.