**Memorandum from Bruce Corkill QC**

**MFAT LEAKS: FINAL REPORT BY Ms REBSTOCK**

 **MEMORANDUM TO DEREK LEASK, AS AT 8 NOVEMBER 2013**

**[ABRIDGED]**

**[*Comment 22 Jan 2014 - Please note that the “Final” Report referred to in this document is the Report provided to the SSC dated 15 October 2013. In the event the 15 October document was returned to the Investigator and a new Final Report issued on 27 November 2013*]**

1. The following are comments only about the section of the Final Report that has recently been provided. That section deals with Third Tier Managers. I have not had the opportunity to consider the remainder of the report.
2. Because of the way in which the matter has been dealt with, it is appropriate to summarise the issues to this point.

***Summary***

1. The MFAT Investigation has in my view suffered from significant procedural defects.
2. The content of the Report in relation to you is in my opinion quite unfair from a legal perspective; particularly serious is the failure to weigh adequately the expert evidence of two former and very senior public servants who made it clear you acted in accordance with well understood protocols.
3. The setting up and conduct of the Investigation was in my view flawed and unjust.
4. Any decision by the State Services Commissioner to publish the final Report would be quite inappropriate in the face of what I see as strongevidence that the Report is in my opinion incorrect and in parts defamatory.

***Content of the Report***

1. In my opinion the Report contains numerous flaws:
* It makes accusations that have little connection with its Terms of Reference (the widening of the meaning of “unauthorised disclosures” seems to take that expression well outside what I and others would have taken from the Terms of Reference and from the correspondence provided by the SSC/Investigation).
* It contains what we see as basic errors of fact (eg on the nature of the material provided to the Foreign Service Association).
* It is often misleading; of particular concern is the treatment given to your observation – made more than once – that the Chief Executive and Senior Leadership Team (SLT) knew you had forwarded your comments to The Department of Prime Minister and Cabinet, because you copied the SLT into the relevant email; neither the Chief Executive nor any SLT member suggested this communication was inappropriate.
* It has omissions.
* It refers to unsourced standards – which despite numerous requests have not been particularised
* It provides scant evidence for much of its comment and its findings.
* It largely ignores the evidence of former senior civil servants like Sir Maarten Wevers who as head of the Department of Prime Minister and Cabinet was closely involved.
* It seems, as I see it, to assess actions taken against a model of consultation that did not exist, (predicated in part on what appears to be a mis-interpretation of the CEO’s correspondence)
* It gives insufficient weight to longstanding and robust MFAT practices of analysis and debate.
* It gives insufficient weight to New Zealand employment law principles.
1. The section of this Report that deals with Third Tier managers holds little of direct relevance to what I consider was the central issue for the Investigation – the leaking of MFAT documents to the Opposition and into the public arena.

***Conduct of the Investigation***

1. Apart from the problems relating to the content of the report, I have in letters to the State Services Commissioner indicated that I consider the conduct of the Investigation has also been inadequate and unjust.
2. On four occasions I have written on a comprehensive basis to the State Services Commissioner to tell him of acute concerns about the conduct of the Investigation and its legal mandate.
* On 7 March 2013 I raised questions about the setting up of the Investigation and its conduct.
* On 18 April 2013 I wrote to say that it was now imperative that the Commissioner should intervene on account of what I saw as significant defects in a process delegated under his authority. I cited concerns I held as to whether the Investigation would deliver fairness or justice.

* On 20 September 2013 I reminded the State Services Commissioner of these concerns, pointing to the seriously inadequate draft report that we had seen, and to ongoing breaches of natural justice.
* On 1 November 2013 following receipt of the Final Report, I advised the State Services Commissioner that I considered that breaches of natural justice remained outstanding. I told him of various other aspects of the Final Report that I saw as requiring correction, including new accusations which were never put to you as my client. I submitted a 21 page table listing those elements of the report that commented on your actions, which required correction.
1. In responding to the first three letters the Commissioner declined to intervene in the Investigation..
2. The Commissioner's response to the final letter is awaited. ***[comment 22 Jan 2014 – this was as of 8 November 2013 – the fourth letter did not change the situation]***
3. I summarise from a legal standpoint my concerns about the nature of the Investigation.

***Natural Justice***

1. The Cabinet Manual (Section 4.73) requires that natural justice must be adhered to in Investigations of this kind and separately points to an Internal Affairs publication which gives specific guidance as to the requirements for natural justice. I consider that these requirements have not always been met during the MFAT Investigation. In particular, it is my view that:
* You were explicitly denied information allowing you to prepare properly for the first interview with the Investigator.
* You were not allowed the most fundamental entitlement – to be told that you had already been identified by the Investigator as someone likely to be seen as culpable in some manner.
* The Investigation failed to provide all the background correspondence between the State Services Commissioner and Ms Rebstock over the setting up of the Investigation, an oversight having an impact on the approach adopted during the first interview.
* The Investigator has revealed that others had spoken of your role in the change process, but you were never informed as to who they were or what they had said, let alone given the opportunity to test their evidence or their motives through cross-examination. The right to know of such evidence and to cross examine is a fundamental right of natural justice.
* The Investigation has at no stage in the process to this point identified any published rule or standard of which you were in breach. Four different iterations of its thinking has made four different series of unsubstantiated accusations and required you to defend yourself against these.
* The Investigation has often failed to provide evidence for its accusations. It volunteered in writing in one draft that a particular and serious charge (since dropped) – that you helped to create the climate in which leaks occurred – had “*occurred*” to the Investigation.
* The Investigation has declined to report in any meaningful way or consider adequately the evidence of highly respected witnesses such as Sir Maarten Wevers and Mr Neil Walter, preferring to quote at length unnamed MFAT staff with unknown degrees of expertise in the matters in question, and with untestable opinions or biases because of their anonymity.
* In the context of natural justice the Investigation has provided various iterations of the draft report. This has been appropriate and potentially useful. However, subsequent versions of the Report have shown no sign that your viewpoints were considered seriously. The sections of the report supposedly presenting your response are, at today's date, derisory.

***The setting up of the Inquiry***

1. The lead investigator was given many of the powers of a Commissioner in a Commission of Inquiry. The Internal Affairs guidelines for such an appointment (see sections 2.3.3 and 10.5.1) suggest strongly that “where an Inquiry could place someone’s professional or personal reputation at stake, then a judge or experienced lawyer should be appointed as the Chairperson. This will ensure correct procedures for fair hearing of evidence are followed”. These guidelines appear to me to have relevance also to an Investigation of this kind, but the criteria clearly have not been met in this case.

***The Matter of Jurisdiction***

1. In my letter of 7 March 2013 I told the State Services Commissioner that the legal basis on which it was set up meant that the Investigator was in my view operating outside her jurisdiction.
2. I will not provide the full legal argument here but I must comment on the inadequate response given by the State Services Commissioner. Section 8 of the State Sector Act is very specific that any investigation initiated by the SSC must relate to a specific function as described under section 6. I asked what specific function the Commissioner was relying on. This was a serious question. I did not get a serious answer.
3. I further pointed out on 18 April 2013, that the Investigator had not been given the powers under section 57C(2) of the Act to provide advice and guidance “ … on the the application of a Code of Conduct in specific cases.” I said that none of her functions entitled her to investigate specific cases.
4. I consider my legal analysis is right – but the main point is that the SSC has simply declined to address the question properly.

***Advice to State Services Commissioner***

1. I was able to obtain a copy of extracts from the final Report only by insisting on your rights under Principle 6 of the Privacy Act. You agreed not to share it with anyone other than your legal adviser.
2. The State Services Commissioner noted that his preliminary view was that he should publish the Report “in the public interest”.
3. I have written in straight forward terms to the State Services Commissioner (in my letter of 1 November 2013).
4. I have told him that the anonymity of Persons Y and Z cannot be maintained unless the entire section on Third Tier Managers as drafted is excised from the report; that is because the contextual information will identify Persons Y and Z.
5. I have told him that in any event the Report is a seriously inadequate document (for the reasons I have outlined above).
6. I advised him against publishing a document which I consider to be seriously flawed and defamatory.
7. I have reminded him of the manifold breaches of natural justice that in my view have occurred.
8. I have pointed out to him a need to consider carefully the conflicts of interest inherent in his own position and inherent in his continuing to use staff who have worked for the Investigation.

***Privacy Act***

1. The position with this Act is clear.
2. Principle 7: you are entitled under this principle to seek corrections to the document now held by the State Services Commissioner insofar as they are related to your personal information. You have done this, requesting urgency, in a 21 page table detailing the manifold corrections required on the grounds of inaccuracy, misleading material and omission.
3. The State Services Commissioner is obliged to consider this request, to take a decision as to whether he accepts some or all of the corrections, and to advise us of his conclusions. You then have the option of seeking the intervention of the Privacy Commission should those corrections not be accepted.
4. At this stage, I hope this may lead to a satisfactory outcome. But if not, then to the extent that the State Services Commissioner does not accept the corrections he is obliged (on request) to ensure that a statement by you is attached to the Report and given equal prominence.
5. Principle 8: in addition the Commissioner is obliged under Principle 8 to ensure the correctness of personal information in the material that he intends to publish.
6. My recent and previous letters together with the 21 page document detailing corrections required in personal information will provide significant material for him to consider in deciding on the correctness of the extracts from the Report.
7. In my view, he cannot without being in breach of the Privacy Act publish the Report as it stands without first undertaking the above procedures.

**Bruce Corkill** **QC**

8 November 2013