



MEMORANDUM

To: Peter Hughes, State Services Commissioner
From: John Ombler, Deputy State Services Commissioner
Date: 25 June 2019
Subject: Investigation into actions and statements of Mr Makhlouf

Introduction

1. On 5 June 2019 you tasked me with undertaking an investigation into certain actions of your employee Mr Gabriel Makhlouf, the Secretary to the Treasury.

Scope of the Investigation

2. You have determined the scope of my investigation as:

In responding to the unauthorised access to Budget material and explaining its causes, in relation to:

- i. *advice given to the Minister of Finance at the time;*
- ii. *the decision to refer the matter to the Police; and*
- iii. *the public statements about the causes of the unauthorised access, did Mr Makhlouf act:*
- iv. *in good faith, including by describing the incident in accordance with the information he had to hand at that time?*
- v. *reasonably, including that he had sought the appropriate advice before taking the actions in paragraphs (i) to (iii)?*
- vi. *in accordance with the Code of Conduct, in particular its requirement to maintain political neutrality?*

3. The actions, advice and statements relevant to this investigation took place during the time period Tuesday 28 May to Thursday 30 May 2019.

Relationship with the Inquiry (into how Budget-sensitive material was accessed)

4. You have asked me to undertake this investigation ahead of the formal inquiry into how Budget-sensitive material was accessed at the Treasury. That inquiry is underway but will not be completed before Mr Makhlouf finishes his term as Secretary to the Treasury on 27 June 2019.
5. This investigation into Mr Makhlouf's actions and statements needs to be completed before that date as, when he completes his term, he will leave your jurisdiction as his employer.

Nature of Investigation

6. This is an investigation into the actions and statements of an employee. The State Services Commissioner is the employer. Mr Makhlouf is the employee. The investigation was instigated due to Mr Makhlouf's actions and public statements about the causes of access to Budget-sensitive material, attracting public and political criticism and becoming the focus of ongoing public debate and interest.
7. In undertaking this investigation, I have endeavoured to comply with the obligations of natural justice. That is, the findings I make are based on evidence, I have given Mr Makhlouf an opportunity to be heard, he has had a reasonable opportunity to comment on any potential adverse findings, and I have considered those comments carefully.

The process

8. I have approached this investigation, and the interviews I have undertaken as part of it, using the principle of "trust but verify" in that I have trusted what people have told me and have taken documents at face value, but sought to triangulate using other sources. I have accepted media statements, emails and text messages as true and have checked statements quoted in media comments with the relevant speaker to confirm their veracity.
9. I have collated a timeline of the critical events comprising this Incident. This is set out in the appendix to this report.
10. I interviewed the following people:
 - a. Mr Gabriel Makhlouf, Secretary to the Treasury
 - b. Ms Ruth Shinoda, Chief Operating Officer, Treasury
 - c. Mr Tom Byrne, Chief Information Officer, Treasury
 - d. Mr David Bowden, Chief of Staff, Treasury
 - e. Mr Jeremy Salmond, Treasury Solicitor, Treasury
 - f. Ms Jacqui Bridges, Manager Communications and Engagement, Treasury
 - g. Mr Alex Harrington, Manager, Budget Management, Treasury
 - h. Mr Andrew Hampton, Director-General, Government Communications Security Bureau (GCSB) and four of his staff
 - i. Dr Brook Barrington, Chief Executive, Department of the Prime Minister and Cabinet, and Chair, Officials Domestic and External Security Committee (ODESC)
 - j. Assistant Commissioner Richard Chambers, New Zealand Police
 - k. Detective Superintendent Iain Chapman, New Zealand Police
 - l. Detective Sergeant Paul Stenzel, New Zealand Police
 - m. Hon Grant Robertson, Minister of Finance
 - n. Mr Alex Tarrant and Ms Chris Bramwell, both Senior Press Secretaries, Office of Hon Grant Robertson
 - o. Hon Simon Bridges, Leader of the National Party, Hon Paula Bennett, Deputy Leader of the National Party, Mr Jamie Gray, Chief of Staff and Ms Belinda Milnes, Deputy Chief of Staff of the Office of the Leader of the Opposition
11. A draft report was then completed and provided to Mr Makhlouf on 18 June 2019 for any comments he wished to provide. I met with him on 20 June 2019 to receive his

comments on the draft report. I have carefully considered those comments in finalising my report.

Review by Mr Michael Heron QC

12. The process followed for this investigation, a draft of this report, and the findings made as a result were reviewed by Mr Michael Heron QC, a former Solicitor-General.
13. Mr Heron's advice and comments have been valuable in completing the investigation and writing this report. But the responsibility for its final content lies with me alone.

Tests against which actions and statements are to be measured

Good faith

14. In the absence of a statutory definition, I propose to determine whether Mr Makhlof acted in "good faith" in this matter based on whether he acted in accordance with the ordinary meaning of that phrase, ie with "honesty or sincerity of intention" (Concise Oxford Dictionary Twelfth Edition).

Reasonableness

15. The ordinary meaning of the term "reasonable" is "fair and sensible", with a secondary meaning of "as much as is appropriate or fair" (Concise Oxford Dictionary Twelfth Edition). Reasonableness has a corresponding meaning.
16. The test for reasonableness is objective and although it will import different meanings in differing contexts, a fundamental requirement is an ability to justify the decision as rational and proportionate.¹
17. Reasonableness does not require perfection but rather that the decision was reasonable in the circumstances at the time it was made,² that it was one that was open to be reached,³ and is "within the limits of reason".⁴ I take this to mean that I cannot find conduct unreasonable merely because I would have made a different decision or a better decision could have been reached.
18. I have considered the information Mr Makhlof was relying on, its reliability, whether there was other information available, and the possibility and practicality of him obtaining other information before taking the actions he did. I have balanced this against the need for him to make any public statements at all on the unauthorised access, and, if there was such a need, whether statements of the sort that were made were reasonable in the circumstances.
19. I note that both the above discussion on "reasonableness", and my terms of reference, use the phrase "at the time". This is important and this investigation has endeavoured not to assess Mr Makhlof's actions and statements using the benefit of hindsight.

Political neutrality

20. The Code of Conduct for the State Services requires State servants to "maintain the political neutrality required to enable us to work with current and future governments". This Code of Conduct applies to Mr Makhlof.
21. Political neutrality means public servants perform their job professionally, without bias to one political party or another. They do not let personal interests or views influence their behaviour or advice. Public servants support Ministers as Ministers of the Crown, not in

¹ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749 at [103].

² *Taiaroa v Minister of Justice [Maori Option Case]* [1995] 1 NZLR 411 (CA) at 418 (Cooke P).

³ *N R v District Court at Auckland* [2014] NZHC 1919 at [8].

⁴ *New Zealand Fishing Industry Association v Minister of Agriculture & Fisheries* [1988] 1 NZLR 544 (CA) (Cooke P).

their political role. Public servants ensure their actions cannot be regarded as compromising the political neutrality principle or undermining the public's trust in their agency.

22. In this way, the Public Service maintains the confidence of the current government and ensures the same relationship can be created with future governments. By the Public Service acting in this way, the public have confidence in the political neutrality of the Public Service and in New Zealand's system of government. The ability of the Public Service to work with successive governments is a core constitutional underpinning of our system.

Definition of "hack"

23. Also central to this investigation is whether it was reasonable to describe the Incident as a "hack", more particularly the phrase "deliberate and systematic hack". I have therefore considered the meaning of that word from various perspectives.

24. A search of New Zealand legislation and legislation in other countries has not revealed any legal definitions of hack or hacking; the word does not appear in New Zealand's Crimes Act.

25. The Oxford Dictionary defines the word as:

Hack (n) – the act of computer hacking.

Hacking – the gaining of unauthorised access to data in a system or computer.

26. The Merriam Webster Dictionary defines the word as:

Hack (n) – an act or instance of gaining or attempting to gain illegal access to a computer or computer system.

27. The Cambridge Dictionary defines the word as:

Hack (v) – to access someone else's computer system without permission in order to obtain or change information.

28. The Collins Dictionary defines the word as:

Hack (v) – if someone hacks into a computer system, they break into the system, especially in order to get secret information.

Hacking (n) – the common and often illegal art of computer hacking.

29. The New Zealand Police website states:

Computer intrusion, commonly referred to as hacking is gaining unauthorised access directly or indirectly to a computer system which can include a desktop, laptop, smart phone, tablet, server or other device regardless of whether it is connected to the internet or not.

30. As can be seen from these different definitions, the words hack and hacking do not have a single precise meaning. In particular, they differ as to the degree of difficulty involved ("access" versus "break into") and in whether the unauthorised access is to information or a system. Further, it appears "hacking" could be legal or illegal.

Convention of Budget secrecy

31. The confidentiality of Budget related information is subject to special constitutional protections.

32. McGee *Parliamentary Practice in New Zealand* (4th edition Oratia) notes at 550:

A constitutional convention of secrecy has been acknowledged to protect Budget related information from being required to be disclosed during the preparation phase of the coming Budget...

33. The Ombudsman's Guide *Confidential advice to Government*, March 2018, notes, under the heading "Budget secrecy":

The [Official Information Act] does not explicitly recognise the convention of budget secrecy. However, budget-related advice to Ministers and Cabinet may be protected by section 9(2)(f)(iv). The Ombudsman has noted that 'the general constitutional convention which protects the confidentiality of advice tendered by Ministers and officials is heightened during Budget preparation' (see case 176434).

Setting the scene

34. There was a public release by the National Party of some material purporting to be from the 2019 Budget at 10am on Tuesday 28 May. There were two further public releases that same day, at 1:30pm and 4:31pm. The latter included reference to the 2019 Legislative Programme. This document was also held by Treasury, but not in the same place as the Budget documents.
35. The Treasury's immediate reaction was to believe that a "leak" had occurred. The documents show that the Treasury moved rapidly to ascertain where any leak may have come from and to lock down the Budget information further.
36. As it turned out, the Budget information was able to be accessed as a result of the following, which I will refer to as the Incident:⁵
- a. The Treasury website uses a content management system to publish content on its website and is configured to index the published content and store the index on a secondary index server.
 - b. The indexing functionality allows users of the Treasury website to search the published content.
 - c. In preparation for Budget 2019 Treasury created a clone copy of the Treasury website (clone website) and volumes of the Budget 2019 content were published on it as they were finalised.
 - d. On Budget day, Treasury intended to switch the clone website to be the main Treasury website.
 - e. This clone website included the configuration settings from the main Treasury website to index the published content and store the index on the same secondary index server.
 - f. Therefore, the indexed content from the clone website that included Budget 2019 information was stored on the secondary index server.
 - g. As the main Treasury website shared the index server with the clone website, search results from the clone server were presented to users of the main Treasury website when those users performed searches.
 - h. As a result, a specifically-worded search produced a result containing small amounts of content from the 2019/20 Estimates documents ("snippets"). The exact wording was required in order to produce a successful result.

⁵ Internal GCSB email 3:21pm Wednesday 29 May, supplemented with information from Treasury's Thursday 30 May 5:05am media statement and information from my interviews.

- i. A large number (approx. 2,000) of search terms were placed into the search bar looking for specific information on the 2019 Budget.
 - j. The searches used phrases from the 2018 Budget that were followed by the "Summary" of each Vote.
 - k. The whole document was not accessible, and returned a "403 error" ("access denied") if clicked on.
 - l. Mr Makhlouf told me that his view of the Incident was that the persons undertaking the searches would have needed a degree of sophistication and knowledge of the Budget documentation and processes, that it was not random, and that it involved a series of patient and persistent searches over approximately two days. He said that the "snippets" returned in the search results then needed to be pieced together (like a jigsaw) in order to compile a coherent document. He considers that it was not a simple matter of searching for Budget 2019 and up popped the answer. I accept his view.
37. By early afternoon on Tuesday, Treasury had begun to suspect that the Incident was caused by the events outlined above. By 3pm that day, Treasury had switched off the function that allowed snippets to be returned with search results. By 6pm that day, Treasury considered it highly likely that the Incident was caused by the search function.
38. In media statements and media interviews about this Incident in the period Tuesday 28 May to Thursday 30 May, Mr Makhlouf advised me that he did not intend to indicate that the facts had changed between his second and third media statements being prepared; he was merely changing the language he used – from "hacking" to "unauthorised access".
39. Mr Makhlouf told me that he did not know the identity of the person or persons who undertook the searches until Hon Simon Bridges made his media statement at 9am on Thursday morning. That was endorsed by all other Treasury staff (who were interviewed separately). There is no evidence to suggest collusion and I do not suspect that.
40. Overall, having undertaken the interviews and assessed the documents, I would describe the tone amongst the key people at Treasury involved in this Incident as initially one of shock and confusion, but they maintained a clear focus on finding the source or sources and seeking to prevent further releases. I note that, at least among some (including Mr Makhlouf) there was a clear view that it was ethically unacceptable for well understood Budget confidentiality practices to be breached. This made them, in my view, focused on the actions of the person or persons who had accessed the material, rather than on the deficiencies in their own systems. This showed in Mr Makhlouf's public statements.

Advice given to the Minister of Finance

Relevant facts

41. Mr Makhlouf gave advice to the Minister of Finance four times in the relevant period:
- a. Tuesday 1pm: Mr Makhlouf and a staff member advised the Minister:
 - i. the Budget numbers released so far appeared to be contained in six volumes of the Estimates, but it was unclear how they had been accessed;
 - ii. people with access to all the Estimates documents were internal Treasury staff, the Parliamentary Counsel Office, Office of the Auditor-General, and Printlink;

- iii. individual Ministerial offices had access to their particular vote Estimates, and the Minister of Finance's office had access to all Estimates at some point;
 - iv. Treasury was seeking assurances from the external agencies about the security of the documents; and
 - v. Treasury had asked its IT people if the information could have been accessed through the website. The initial view was no, but they were investigating further.
- b. Tuesday 7:15pm: Mr Makhoulf went alone to the Minister's office to advise:
- i. Treasury thought it was very likely that the information released so far had been accessed via deliberate searches on the Treasury website which allowed terms to be entered that accessed the clone website (via its indexer) and displayed some information in the search results (a "snippet").
 - ii. He was not able to explain the technical reason why this had happened, but explained that there had been around 2000 searches for Budget material since 00:49 on Sunday – it was systematic, not a random search, and was clearly targeting embargoed Budget information (based on what was being searched for).
 - iii. Treasury had identified two IP addresses, one from Parliamentary Services and one from 2 degrees, as being responsible for these searches.⁶
 - iv. Treasury could not rule out that the information had not come from some other source.
 - v. There was no evidence of a link to the National Party, but the information accessed through the website corresponded to the information that had been published.
 - vi. In accordance with the protocol under the New Zealand Information Security Manual, Treasury had contacted the National Cyber Security Centre (NCSC) (part of the GCSB) and the NCSC advised that it was a matter for the Police.
 - vii. The Police had contacted Treasury and Treasury had referred the matter to them.
 - viii. Mr Makhoulf noted that the Parliamentary Counsel Office, Office of the Auditor-General and Printlink also had copies of the information but the Treasury had asked them to confirm security arrangements and lock down their information (paper and electronic).
 - ix. Mr Makhoulf was asked if Treasury knew whether it could be an overseas attack and why GCSB was not investigating. He replied that, although Treasury has the IP addresses, it could not rule out foreign actors or whether a bot may have been involved. He said he did not know why the GCSB itself was not investigating the matter.
 - x. Mr Makhoulf indicated to the Minister that he felt he had to issue a media statement, but that he was not planning to do any media interviews. He read out the draft statement to the Minister (including that the Treasury had sufficient evidence to indicate that its systems had been deliberately and systematically hacked).
 - xi. The Minister agreed that Mr Makhoulf would not do any media interviews and that the Minister would do media interviews the following day.

⁶ Subsequently, a third IP address was identified, at a later date.

- xii. Mr Makhlouf stepped out of the meeting (at 7:37pm) and called Brook Barrington (as Chair of ODESC) to ask why GCSB had not taken on the investigation. Mr Barrington said that was probably because the GCSB did not have jurisdiction over potential criminality. Mr Makhlouf relayed this to the Minister.
 - xiii. The Minister asked that Mr Makhlouf let him know when he had issued the media statement.
 - xiv. I gained the clear view from the two Minister's office staff who I interviewed that they thought there was an intrusion into the cloned website that was a far more serious computer system intrusion (that is, not merely searches) than was actually the case.
- c. Tuesday 9:22pm: Mr Makhlouf returned a call from the Minister of Finance at 9:20pm. In response to the Minister's question, he confirmed that there was no evidence of a direct link with the National Party. He told him that the information that had been accessed was the same as what had been released by the National Party but there was no evidence of a direct link.
- d. Wednesday approximately 5:30pm: Mr Makhlouf told the Minister that as no additional information had been released it seemed much more likely that the website was the source. However, Treasury was not able to rule out other sources. In view of the Police decision (that on the face of it there was no offence), Mr Makhlouf indicated that he would issue a media statement and that the State Services Commission would issue a statement about their inquiry into the unauthorised release of Budget information. He suggested that the media statement should be issued on Friday to allow more time to finalise the scope of the inquiry and to not interfere with Budget day.

Discussion

42. At all times, Mr Makhlouf's advice to the Minister was accurate according to what he knew at the time.
43. I see no evidence that, in all of his advice to the Minister on this matter, Mr Makhlouf acted in anything other than good faith and I do not find any political bias in his actions.
44. In relation to reasonableness, I have considered Mr Makhlouf's actions and statements within the framework of whether they were fair, sensible, available to be reached and within reason. I acknowledge that the Minister's office staff who I interviewed were left with an impression, at Mr Makhlouf's 7:15pm meeting with the Minister, of a more serious intrusion into Treasury's cloned website. However, I do not find that Mr Makhlouf incorrectly described the incident. I consider that his description, including the reference to "deliberate" and "systematic" hacking, focused too much on the actions of a "hacker" rather than the Treasury error whereby content was accessible on the Treasury system.
45. If he had been clearer about the Treasury error, the Minister and his staff may have understood that it was relatively straightforward for the searches to be undertaken and may have challenged more strongly the description of those actions as hacking. However, I note that hacking is an imprecise term and it was an available description in these circumstances.
46. I need to weigh his actions against the need for swift action given that Mr Makhlouf did not know if further Budget material had been obtained and would be released before the Budget announcement. In that context, I consider Mr Makhlouf's actions to be reasonable.

Findings

47. I conclude that, in providing advice to the Minister of Finance in relation to the Incident, Mr Makhlouf acted in good faith, reasonably and without political bias.

The decision to refer the matter to the Police

Relevant facts

48. The Treasury's Chief Information Officer (CIO), at 5:32pm, contacted the NCSC hotline and described the Incident. He was told they would call the on-call person.

49. At 6:01pm, the on-call person from NCSC called the CIO, who stepped out of the Treasury Crisis Management Team meeting he was in. The CIO described the Incident, including the cloning process, the search mechanism, and the searches as seen in the logs. The CIO asked if this was something the NCSC could help with and/or if, in their view, the Treasury should refer the matter to the Police. The on-call person responded that it was a "100% Police matter" and offered to contact a member of the High Tech Crimes Unit at the Police and have them call the CIO.

50. Mr Makhlouf asked whether the Treasury should refer the issue to GCSB and the CIO said that he had spoken to them and they had said it was a matter for the Police and NCSC would contact the Police directly.

51. The Treasury Solicitor provided advice to Mr Makhlouf about referring a suspected crime to the Police. The meeting discussed and agreed that it was not for the Treasury to investigate whether the activity was legal.

52. At 6:14pm, during the Crisis Management Team meeting, the CIO received a call from an officer from the High Tech Crimes Unit at the Police. Mr Makhlouf confirmed that the CIO should refer the Incident to the Police. The CIO did so and made it clear that the purpose of the referral was so that the Police could determine whether or not a crime had been committed. The Police requested the search log files from the website.

Discussion

53. As can be seen from the above, Mr Makhlouf took legal advice about whether he should refer the Incident to Police and decided to do so. He reasonably inferred that both GCSB and the Police thought that it was reasonable to do so because:

- a. GCSB referred to the matter as being a "100% Police matter"; and
- b. the Police called Treasury to seek out the report.

54. From interviews with the Police officers involved in this Incident, I received confirmation that they consider it was reasonable in the circumstances that Treasury referred this matter to the Police. In my view, referral to the Police was an action available to Mr Makhlouf, based on the information he had at the time. I therefore find that the action was reasonable.

55. I have no evidence that Mr Makhlouf's referral of this matter to the Police was not in good faith; he acted on the advice he received.

56. The National Party told me that they believe that the referral to the Police was inappropriate because there was nothing illegal in their searching and they "consider [it] to be an attempt to gag the Opposition and stop us releasing further details. This is a serious abuse of his position and presents a significant constitutional concern" (letter from Hon Paula Bennett, received 13 June 2019).

57. I heard nothing in any of my other interviews with Treasury, GCSB or the Police that indicates that Mr Makhlouf believed the National Party was responsible for the Incident and, in fact, he was open to the prospect that an intermediary was passing information to them. I therefore do not believe there was any political motivation in referring the matter to the Police. He suspected there may be a breach of the law so, irrespective of who might have breached the law, it was reasonable that he refer it to the Police.

Findings

58. Mr Makhlouf's decision to refer the matter to Police was in good faith, reasonable and showed no evidence of political influence.

The public statements

Relevant facts

59. Treasury released three media statements relating to the Incident:

a. Tuesday 12:18 pm:

Secretary to the Treasury Gabriel Makhlouf issued the following statement after noting this morning's reports of a potential leak of Budget information.

"Right now we're conducting our own review of these reports and the information that has been published," said Makhlouf.

"As far as the Treasury is concerned, the release of Budget 2019 will proceed as planned this Thursday", he said.

b. Tuesday 8:02 pm:

Following this morning's media reports of a potential leak of Budget information, the Treasury has gathered sufficient evidence to indicate that its systems have been deliberately and systematically hacked.

The Treasury has referred the matter to the Police on the advice of the National Cyber Security Centre.

The Treasury takes the security of all the information it holds extremely seriously. It has taken immediate steps today to increase the security of all Budget-related information and will be undertaking a full review of information security processes. There is no evidence that any personal information held by the Treasury has been subject to this hacking.

c. Thursday 5:05 am:

Following Tuesday's referral, the Police have advised the Treasury that, on the available information, an unknown person or persons appear to have exploited a feature in the website search tool but that this does not appear to be unlawful. They are therefore not planning further action.

In the meantime, the Treasury and GCSB's National Cyber Security Centre have been working on establishing the facts of this incident. While this work continues, the facts that have been established so far are:

- *As part of its preparation for Budget 2019, the Treasury developed a clone of its website.*
- *Budget information was added to the clone website as and when each Budget document was finalised.*

- On Budget Day, the Treasury intended to swap the clone website to the live website so that the Budget 2019 information was available online.
- The clone website was not publically [sic] accessible.
- As part of the search function on the website, content is indexed to make the search faster. Search results can be presented with the text in the document that surrounds the search phrase.
- The clone also copies all settings for the website including where the index resides. This led to the index on the live site also containing entries for content that was published only on the clone site.
- As a result, a specifically-worded search would be able to surface small amounts of content from the 2019/20 Estimates documents.
- A large number (approx. 2,000) of search terms were placed into the search bar looking for specific information on the 2019 Budget.
- The searches used phrases from the 2018 Budget that were followed by the "Summary" of each Vote.
- This would return a few sentences – that included the headlines for each Vote paper – but the search would not return the whole document.
- At no point were any full 2019/20 documents accessible outside of the Treasury network.

The evidence shows deliberate, systematic and persistent searching of a website that was clearly not intended to be public. Evidence was found of searches that were clearly intended to produce results that would disclose embargoed Budget information. Three IP addresses were identified that performed (in the Treasury's estimation) approximately 2,000 searches, over a period of 48 hours, which pieced together the small amount of content available via the search tool. The IP addresses involved belonged to the Parliamentary Service, 2degrees and Vocus.

The nature of these searches ultimately led to unauthorised access to small amounts of content from the 2019/20 Estimates documents, none of which were due to be available to Parliament and the public until Budget Day.

In light of this information, Secretary to the Treasury Gabriel Makhlouf said, "I want to thank the Police for their prompt consideration of this issue. In my view, there were deliberate, exhaustive and sustained attempts to gain unauthorised access to embargoed data. Our systems were clearly susceptible to such unacceptable behaviour, in breach of the long-standing convention around Budget confidentiality, and we will undertake a review to make them more robust."

The Treasury took immediate steps yesterday to increase the security of all Budget-related information. Mr Makhlouf has now asked the State Services Commissioner to conduct an inquiry in order to look at the facts and recommend steps to prevent such an incident being repeated.

60. Mr Makhlouf also conducted media interviews between 6:30am and 8am on Wednesday 29 May. He spoke with Newstalk ZB, Morning Report, The AM Show, and TV1 Breakfast. There were three parts of those interviews relevant to this investigation:

- a. The analogy Mr Makhlouf used to describe the Incident (the bolt analogy), which he described on Morning Report as follows:

Well when we looked at our systems, we found, actually let me give you an example Susie. Imagine you've got a room in which you have placed important documents that you feel are secure, they're bolted down under lock and key, but unknown to you, one of those bolts has a weakness. And someone who attacks that bolt deliberately, persistently, repeatedly, finds that it breaks and they can enter and access those papers. And that's what's happened here. It wasn't an instance of someone stumbling into the room accidentally, it wasn't an instance of someone attacking the bolt and finding that it broke, it broke immediately. It was someone who tried not once, not twice, in fact over 2000 times to attack that bolt. And when I saw that evidence yesterday, late afternoon, I decided it was something that I had to refer to the police.

- b. Mr Makhlouf was clear that he was not drawing any conclusions about the National Party and was careful to distance himself from any direct connection with the National Party when pressed by the interviewers.
- c. Mr Makhlouf had (largely) altered the way that he referred to the Incident by avoiding using the word "hack" and instead describing the Incident using a longer form description: "persistent and multiple attempts to gain unauthorised access to Budget-related information".

Discussion

Use of the phrase "deliberately and systematically hacked"

61. At the Tuesday 6pm meeting, the Treasury Crisis Management Team discussed whether the Incident constituted hacking and considered the definition of that word. The definition they considered was from the Oxford Dictionary. That is an authoritative source and it was reasonable for Mr Makhlouf to rely on it, in that it was one of the actions available to him and within the limits of reason.
62. However, I did not receive any evidence that the meeting considered whether it was appropriate to combine "hacking" with "deliberate and systematic". While they discussed the phrase generally, they did not debate the content of the draft media statement and how it could be interpreted. Mr Makhlouf considers that the words "deliberate" and "systematic" were simply descriptive of the Incident. While I consider that Mr Makhlouf is literally correct, I find that the phrase increased the flavour of the unacceptability of the activity described as hacking.
63. The NCSC (part of the GCSB) was mentioned in this media statement but was not consulted on the draft. It would be normal and good practice to consult other Government agencies mentioned in a media statement, especially one where, as in this case, the agency is the system lead and therefore the Government's lead adviser on information security. Had the GCSB been consulted on the draft, concerns over the different interpretations of the word hacking would likely have surfaced⁷ and could have been addressed.
64. Prior to issuing the media statement at 8:02pm on Tuesday, Mr Makhlouf had been to the Minister of Finance's office where some staff questioned the appropriateness of the choice of words. I have considered whether this should have caused Mr Makhlouf to

⁷ I note that the GCSB interviewees advise that when they saw the word "hacked" used in the Treasury 8:02pm media statement, they immediately contacted the Treasury to record their concern. This is confirmed by file notes made at the time.

seek further advice before issuing that media statement. However, Mr Makhlouf does not recall any note of caution and the Minister's office staff I had interviewed told me only that a question was raised. I find that the raising of a question was not sufficient to have reasonably caused Mr Makhlouf to reconsider his media statement.

65. The choice of the phrase "deliberately and systematically hacked" for the draft of the Tuesday 8:02pm media statement was reasonable (see paragraphs 61 and 62).
66. However, in my view, had further advice been sought from GCSB, a less ambiguous and negative phrase could have been chosen. I believe that it was not reasonable to use the phrase "deliberately and systematically hacked" in the final media statement because, had Mr Makhlouf sought all of the appropriate advice before making the media statement, it is probable that this phrase would not have been chosen (that is, it would no longer have been a statement available to Mr Makhlouf to use; it would have been outside the limits of reason). My finding is supported by Mr Makhlouf's change in wording choice (from "hacking" to "unauthorised access") between the Tuesday night media statement and his Wednesday morning interviews.
67. The National Party say that by 6pm on Tuesday, Mr Makhlouf "knew without doubt that it was not a hack or any form of cyber-attack" because "the GCSB had categorically told Treasury that it was an 'information management issue'" (letter from Hon Paula Bennett, received 13 June 2019). With respect, I cannot agree that there is evidence to support such a finding. GCSB's communication with Treasury around 6pm on Tuesday did not use the words "information management issue" and I was advised by the GCSB that this phrase was not discussed with Mr Makhlouf (or Treasury staff) until after the 8:02pm media statement had been released. Mr Makhlouf was told that GCSB had advised it was a Police matter, but not specifically whether it was not a hack or not. GCSB prefers to use the term "network compromise" for accuracy, but this was not a subtlety of which Mr Makhlouf was advised.
68. I have seen nothing to suggest that he did not make these media statements in good faith and in a politically neutral manner.

The bolt analogy

69. Mr Makhlouf agreed with the Minister of Finance's office at 9:50pm on Tuesday that he would undertake media interviews from 6:30am the following morning. At 10:03pm he rang his communications manager about the interview and at 10:39pm the communications manager emailed him the details of the interviews for the morning. The communications manager told me that she offered support to Mr Makhlouf to prepare for the interviews but he did not require it. She was comfortable that Mr Makhlouf could undertake these interviews without further preparation based on the discussions throughout the day.
70. Mr Makhlouf arrived at work extremely early to prepare for the interviews and did not have staff support. He advised me that he thought of the bolt analogy at about 4:30am and did not have the opportunity to discuss it with his staff, given the hour of the day. He wanted to use an analogy to simplify complex information technology concepts so that his audience could understand what happened. He advised me that he was trying to communicate that there had been a "chipping away" at information that was thought to be inaccessible. He had tested with the Chief Executive of the Department of the Prime Minister and Cabinet (DPMC) his description of the Incident as involving multiple and persistent attempts over 48 hours to access information that was not ready for public release. He therefore considered that an analogy that communicated that flavour was appropriate and reasonable.

71. Mr Makhlouf used the bolt analogy in a number of the media interviews. In my view, the bolt analogy implied a degree of force to enter the cloned website and that it took multiple attempts to enter the secure part of the website. That was not the case. In fact, multiple searches on Treasury's public website were undertaken to piece together information from the cloned website.
72. In my view, the use of the bolt analogy was unreasonable. It was, however, used in good faith and there was no question of any political bias.

References to the National Party

73. The National Party consider that, because they been releasing information from the Budget, and because Mr Makhlouf was referring to hacking and had referred the Incident to the Police, the National Party's reputation was being impugned. They say:

Treasury did not need to say specifically that National hacked its website, because the reasonable inference from their words and actions and the full context in which they were expressed is more than sufficient for an ordinary person to draw the conclusion that the party they were referring to was the National Party (letter from Hon Paula Bennett received 13 June 2019).

74. I find that Mr Makhlouf was careful in the media interviews not only to avoid linking the National Party to the conduct but he also specifically refused to be drawn into any such association by interviewers. He and other Treasury staff have told me that he did not know whether the National Party had accessed the Budget material or if they had received the material from a third party.
75. I find no grounds on which I am able to support a finding of political bias.

The Thursday morning media statement – content and timing

76. At 5:05am on Thursday, the Treasury issued its third media statement on the Incident. In that statement, it no longer referred to hacking and did not describe conduct similar to the bolt analogy. That left many people thinking that Treasury had discovered the Incident was not hacking and had a much more simple explanation. The Treasury staff I interviewed have advised that was not their intention. They have told me that:
- a. Their understanding of the Incident did not change between Tuesday night (when the second media statement was released) and Wednesday night (when the third media statement was finalised).
 - b. They still considered it to be hacking (within their definition).
 - c. They understood that others had different understandings of that word so it was no longer a helpful description of the Incident.
77. The Thursday morning media statement described the Incident as "unacceptable behaviour". The National Party objects to this description in that they say it was perfectly legitimate conduct when the information was available on a public website.
78. The National Party therefore felt maligned by Mr Makhlouf's statements, but I find that he did not intend to direct his statement at them as, at that time, he had no knowledge that they had undertaken the searches.
79. The National Party told me that:

Treasury not only had the Parliamentary and external IP address' of some of our staff members who had the material at that time, but that a senior legal counsel at Treasury had looked up the LinkedIn profile of one of those staff members on Tuesday afternoon. This clearly established that the highest levels of the organisation knew

the information had been found by an individual from within the National Party. (letter from Hon Paula Bennett, received 13 June 2019).

80. In relation to the IP addresses, I understand from the Treasury CIO that the Treasury knew that one of the IP addresses was "Parliamentary Services" from a WHOIS⁸ internet search, but beyond that they knew nothing about the location or identity of the searcher. I note that a search from a Parliamentary Services IP address could have been undertaken from a device anywhere in New Zealand, or beyond.
81. In relation to the LinkedIn search, I understand that this was done by the Treasury Solicitor. The Treasury Solicitor undertook this search because the National Party staff member was named within the document profile for the "Overview of Votes" document released by the National Party as the author of that document. Knowing that the document author works for the National Party only told the Treasury that the National Party created the document that they later released, and not that the National Party had undertaken the searches. The Treasury Solicitor took the matter no further (nor did he have any ability to do so).
82. The National Party also stated that:
- There is strong evidence that Treasury knew at 2pm on Tuesday 28th exactly **how** the information had been revealed, as they or their agents, took targeted actions to remove the exact documents from the website. (letter from Hon Paula Bennett, received 13 June 2019).*
83. My interviews have established that Mr Makhoulf suspected the clone website weakness by 1:10pm on Tuesday 28 May, and Treasury closed that off by 3pm that day. However, they were still investigating other potential leaks through until Wednesday afternoon and beyond. Further, they were not advised by the Police that on the face of it there was no offence until 1:40pm on Wednesday 29 May. The National Party have stated that they felt that the Treasury "sat on a lie" by not clarifying the situation earlier.
84. The Treasury could have begun preparing a media statement at any time after the 4:30pm meeting between Chief Executives on Wednesday as, by then, they were in possession of all the relevant facts. However, I do not believe that Mr Makhoulf was unreasonable in the choice of timing for this media statement. It takes time to draft an accurate media statement and to appropriately consult other agencies.
85. In relation to the content of the media statement, in my view, it was clear that Mr Makhoulf felt that a person who received a snippet of information in response to a search on a public website but was denied access to the full document should have known that the snippet was in error, that they were not authorised, and that they should have reported the error to Treasury.⁹ He considers this especially so given that the searcher or searchers needed to have some knowledge of Budget practices, and therefore should have also known that Budget information is confidential under the convention of Budget secrecy.¹⁰
86. But this convention applies only to Ministers and the Public Service, not the public at large (even those with knowledge of Budget processes). Implicit authorisation may be

⁸ WHOIS is a query and response protocol that is widely used for querying databases that store the registered users or assignees of an Internet resource, such as a domain name, an IP address block or an autonomous system. (Extract from Wikipedia, obtained 17 June 2019).

⁹ The Computer Emergency Response Team in New Zealand (CERT NZ) encourages anyone who identifies a potential vulnerability in a product or online service to make direct disclosure to the organisation that developed the product or service (see www.cert.govt.nz).

¹⁰ See paragraphs 31-33.

considered to have been granted if even a snippet appears in a search result on a public website.

87. When I interviewed him for a second time, Mr Makhlouf remained firmly of the view that the convention of Budget secrecy should be understood and respected. He also talked of the media embargo of Budget information until the time that the Minister tables the Budget in the House as further evidence of the same long-held convention. Mr Makhlouf's view was that these practices should apply universally. In my view, this is an ethical, not legal, position, given that the convention of Budget secrecy only applies to Ministers and public servants.¹¹
88. The Police, on the basis of the information they assessed, came to a view that the accessing of the information in the Treasury's cloned website was not illegal.
89. It is not a function of this investigation to adjudicate on these ethical and legal matters.
90. In my view, Mr Makhlouf erred in believing that the public should be held to the same standard as he would expect of his Treasury officials and the wider Public Service.
91. In reaching my view on the reasonableness of the content of the 5:05am Thursday media statement, I have also considered that:
 - a. Mr Makhlouf shared the draft media statement with his relevant Chief Executive colleagues and received comments from GCSB and an acknowledgement from DPMC;
 - b. Mr Makhlouf took professional advice from within Treasury on his draft media statement;
 - c. in my view, the media statement focuses on the person or persons who undertook the searches rather than on Mr Makhlouf's responsibility to keep Budget material confidential, in that it refers to the searching as "unacceptable conduct" and referring to "deliberate, systematic and persistent searching of a website that was clearly not intended to be public"; and
 - d. the media statement states that Treasury's systems were "clearly susceptible", that security had been increased and that a review and Inquiry would take place, which are similar statements to those Mr Makhlouf made in the Tuesday 8:02pm media statement and in the Wednesday morning media interviews.
92. I have carefully weighed up the matters above and considered Mr Makhlouf's view that he acted reasonably because he admitted the deficiencies in Treasury's system without trying to downplay them, he took appropriate advice from others about the draft media statement and that, on any reasonable perspective, the actions of the searcher or searchers were not acceptable. I have considered whether Mr Makhlouf's decision was outside the limits of reason in the circumstances at the time.
93. I have reached the view that I cannot agree with Mr Makhlouf and I find that he did not act reasonably in issuing the 5:05am Thursday media statement in the form in which it was issued, principally because that statement focuses more on the actions of the person or persons who undertook the searches than on Mr Makhlouf's responsibility to keep Budget material confidential and because he applies the convention of Budget secrecy too widely.
94. I find that Mr Makhlouf was acting in good faith in issuing the 5:05am Thursday media statement. He believed that the conduct of the then-unknown person or persons accessing the confidential Budget documents was unacceptable. I have also thought

¹¹ See paragraphs 31-33.

very carefully about my assessment of whether Mr Makhlouf was acting in good faith in relation to his media statements and interviews more generally. In particular, I have considered whether Mr Makhlouf was deliberately being less than fulsome in his description of the Incident in order to draw attention away from the Treasury's system failure. Mr Makhlouf made the point to me that he very deliberately held back some information in his Tuesday evening statement and in his Wednesday morning interviews, due to the fact that the Police were yet to decide on potential illegality. I consider this to be reasonable. In my observation, early on in this Incident, Mr Makhlouf seems to have developed a very strong mental model which was based on the unacceptability of the conduct of the person or persons undertaking the searches. That view was reflected in his statements over the following 36 hours. I consider that Mr Makhlouf's view was sincerely held and honest, and therefore meets the good faith test.

95. I am also satisfied that he held those views irrespective of who accessed the information, and therefore acted in a manner expected by the Code of Conduct's obligation to act with political neutrality.

Findings

96. In summary, I find that, in relation to Mr Makhlouf's written and oral media statements:

- a. Mr Makhlouf acted in good faith at all relevant times;
- b. Mr Makhlouf acted in a politically neutral manner at all relevant times; and
- c. Mr Makhlouf did not act reasonably in relation to:
 - i. his use of the phrase "deliberately and systematically hacked" in his Tuesday evening media statement;
 - ii. his use of the bolt analogy in his media interviews on Wednesday morning; and
 - iii. in his media statement on Thursday morning, continuing to focus on the conduct of those searching the Treasury website rather than the Treasury failure to keep Budget material confidential.

Conclusion

97. I have assessed Mr Makhlouf's actions and statements in relation to the three aspects of the Incident against standards of good faith, reasonableness and political neutrality. I have found that:

- a. Mr Makhlouf acted in good faith. I consider that Mr Makhlouf's view was sincerely held and honest and therefore meets the good faith test.
- b. Mr Makhlouf acted in a politically neutral manner. In fact, I consider that he went out of his way to ensure that he was not implicating the National Party in his media statements and interviews.
- c. Mr Makhlouf's actions and statements were reasonable in all respects other than in relation to his use of the phrase "deliberately and systematically hacked" in his Tuesday evening media statement, his use of the bolt analogy in his media interviews on Wednesday morning, and in the focus on the conduct of the searchers in his media statement on Thursday morning.

Recommendations

98. It is recommended that you:

- 1 **note** the findings in this report; and

- 2 **note** that Mr Makhlouf disagrees with my findings that his actions and statements were unreasonable in some respects, as he considers that he acted at all times in good faith, reasonably, and in a politically neutral manner.

A handwritten signature in blue ink, appearing to read "John Ombler", with a short horizontal line underneath the name.

John Ombler
Deputy State Services Commissioner

Appendix: Timeline of relevant events

Tuesday 28 May 2019

- 10:00am National Party makes a media statement revealing Budget details
- 10:30am Minister of Finance (MoF) phones Secretary to the Treasury Mr Makhlouf
- 10:35am Treasury officials update Mr Makhlouf on Incident and the steps being taken
- 11:12am MoF phones Mr Makhlouf. Mr Makhlouf says that it is not the whole Budget but some correct numbers
- 12:18pm Treasury makes its first media statement
- 1:00pm Mr Makhlouf and Manager, Budget Management, Treasury meet with MoF (see paragraph 41 (a))
- 1:04pm Treasury official texts Mr Makhlouf to say information could not have come from website as only part of the released information is there
- 1:05pm Treasury Web and Publishing Team work out that the website search function is showing results of the Estimates and stop loading further information on clone site
- 1:30pm National Party makes a second release of Budget details
- 1:51pm Treasury IT team starts making changes to prevent search snippets from the clone site showing on the live site
- 2:30pm Mr Makhlouf meets with Chief Executive, Department of Prime Minister and Cabinet (DPMC) and State Services Commissioner. Explains that Treasury suspect the information came from the Estimates, and Treasury are locking down documents and checking security
- 3:00pm (approx.) Treasury IT team turns off function that creates snippets on Treasury website
- 3:00pm Treasury convenes first crisis management team meeting. Discusses a response plan, the snippets function (still unclear if all the released information was accessible by these means), possibility of internal leak and increasing security of hard copies
- 4:31pm National Party makes a third release of Budget details and refers to having obtained the Government's 2019 legislative programme
- 5:05pm Treasury officials meet with Mr Makhlouf, explain that access to information had been possible through website with precise searching. Still unclear what information accessed or whether other sources
- 5:25pm Having analysed the search logs, Treasury IT team confirms to Treasury Chief Information Officer that searches would have yielded information that matches the release. Identifies IP addresses and the number of searches
- 5:32pm Treasury CIO phones the NCSC hotline. NCSC says on-call person will call back
- 6:00pm Treasury reconvenes crisis management team meeting
- 6:01pm NCSC responder phones Treasury CIO. Treasury CIO describes the Incident and asks if this is for NCSC or Police. NCSC responder confirms Police and that Police High Tech Crimes Unit will call Treasury CIO back

6:03pm Treasury CIO returns to crisis management team meeting and explains about the website searches. Discuss 'hacking'. Treasury CIO says he has phoned NCSC and it has referred it to Police. Treasury Solicitor gives advice about referral to Police

6:06pm NCSC phones Police Detective Sergeant (DS), informs of Incident and advises that not NCSC's remit. Suggests Police contact Treasury CIO

6:14pm Police DS phones Treasury CIO, who steps out of meeting to take the call. Treasury CIO describes Incident. Police requests search log files. This was the point that Treasury officially referred the Incident to the Police

Treasury CIO returns to meeting, relays Police call. Mr Makhoulf decides to inform MoF, the State Services Commissioner, and Chief Executive DPMC and decides to issue media statement

6:42pm Police DS refers Treasury CIO to another police officer regarding media statement

6:45pm NCSC alert Government Communications Security Bureau (GCSB) Director-General that Treasury has contacted them about unauthorised access of Budget information

7:15pm Mr Makhoulf meets with MoF. Explains the situation, draft media statement (see paragraph 41 (b))

7:35pm Police media team contact Treasury Communications Manager to liaise about media statement. Treasury provides draft

7:36pm NCSC phones Police DS. DS says he is unsure whether this is an offence. Says that Treasury is going to make media statement

8:02pm Treasury makes media statement

8:25pm GCSB Director-General phones Chief Executive, DPMC. Explains that as far as NCSC aware, there was no compromise of the Treasury website, this did not involve a 'hack' but was an information management issue

9:02pm GCSB Director-General texts Mr Makhoulf to say this is not a 'hack' and they need to correct

9:13pm GCSB Communications Advisor phones Treasury Communications Manager to discuss concern with word 'hack' and lack of consultation on media statement

9:14pm Mr Makhoulf phones GCSB Director-General. Discussion about the use of the word 'hack' where they had a difference of view

9:22pm Mr Makhoulf returns call from MoF. Confirms that no evidence of National Party involvement

9:50pm Minister's Press Secretary asks Mr Makhoulf to do media interviews in the morning

9:56pm Chief Executive, DPMC phones Mr Makhoulf. Mr Makhoulf tells him he is doing media interviews in morning. Further discussion about use of word 'hack'

10:03pm Mr Makhoulf calls Treasury Communications Manager about media interviews for the morning

10:39pm Treasury Communications Manager emails details of media interviews to Mr Makhoulf

Wednesday 29 May

- 4:30 - 6am Mr Makhlouf prepares for morning media and develops the bolt analogy
- 6:30 – 8am Mr Makhlouf does morning media interviews
- 11:00am Conference call between Police and Treasury. Police say they are looking into whether a crime has been committed
- 1:15pm Mr Makhlouf attends meeting with State Services Commissioner, Chief Executive, DPMC, Director-General GCSB, and Secretary of Internal Affairs to discuss security of systems
- 1:40pm Police Commissioner phones Mr Makhlouf and says that Police are not investigating further. This is aggressive searching but not a crime. Mr Makhlouf relays this to meeting
- 3:30pm Police officers meet with Police Legal Services to discuss possible offences
- 4:22/4:43pm Detective Superintendent, Police phoned Treasury CIO to tell him that Police not taking matter further. Treasury CIO says Police Commissioner already had passed this on
- 4:30pm Mr Makhlouf attends reconvened meeting with State Services Commissioner, Chief Executive, DPMC, Director-General GCSB, and Secretary of Internal Affairs to discuss security of systems. Deputy State Services Commissioner joins part of the meeting
- 5:30pm Mr Makhlouf tells MoF of Police decision. Suggested media statement on Friday
- (afterwards) Mr Makhlouf told by MoF's office that wanted media statement to go out before Budget
- 7:06pm Director-General, GCSB calls Principal Communications Advisor to discuss Treasury media statement that was expected to be released
- 8:08pm Mr Makhlouf sends draft statement to Commissioner of Police
- 8:10pm Mr Makhlouf sends draft statement to Chief Executive, DPMC, State Services Commissioner and Director-General, GCSB. Director-General, GCSB consulted with staff about statement and suggested some edits
- 8:53pm Treasury Communications Manager sends draft statement to MoF's office
- Before 9:11pm Conference call between MoF office staff, Mr Makhlouf and Treasury Communications Manager about timing; decided to issue in morning
- 9:18pm Director-General, GCSB calls Principal Communications Advisor to discuss Treasury media statement and confirm GCSB's media approach
- After 9:30pm Embargoed Treasury media statement sent to relevant Chief Executives and Treasury executive leadership team

Thursday 30 May

- 5:05am Treasury issues media statement
- 9am National Party media conference
- 2:00pm Budget is released.