

FINAL REPORT (Redacted)
Investigation pursuant to referral
Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Agency	Department of the Premier and Cabinet
Ombudsman reference	2013/07046
ICAC references	2013/000114; 2013/000463
Date of referral	7 November 2013
Issues to be assessed	Whether officers of the Department of the Premier and Cabinet committed misconduct or an act of maladministration in public administration in a trip to New Zealand with an incumbent supplier during a tender process

Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012 (ICAC Act)*, as raising a potential issue of misconduct or maladministration in public administration within the meaning of that Act (**the referral**).

The referral arose out of a report to Ombudsman SA made by a 'whistleblower' pursuant to the *Whistleblowers Protection Act 1993*.

Action taken

Using my powers under the *Ombudsman Act 1972*, I have conducted an investigation of the issues in response to the referral, including:

- assessing the information provided by a 'whistleblower' to Ombudsman SA pursuant to the *Whistleblowers Protection Act 1993* (**the whistleblower**)
- obtaining and assessing a response and documents from the Acting Chief Executive of the Department of the Premier and Cabinet (**the department**)
- communicating with management in the Office of the Chief Information Officer (**OCIO**)
- reporting the issue to the Office for Public Integrity (**OPI**) pursuant to the Direction Guidelines under the ICAC Act
- receiving and assessing the referral
- issuing a summons for production of documents to Company F SA
- interviewing Mr A, Director, ICT Strategic Sourcing, OCIO and Mr B, Director, StateNet Services, OCIO on oath and receiving and considering their documentation provided to the investigation
- the Manager of Company F, Mr C was on extended sick leave during the investigation and not available to give evidence. However, documents were retrieved from Mr C's computer

- considering:
 - the ICAC Act and the Ombudsman Act
 - the results of independent research, including a background paper ‘Strategic procurement of ICT products and services by the South Australia government’ dated 26 March 2012
 - Code of Ethics for the South Australian Public Sector made pursuant to the *Public Sector Act 2009*
- preparing a provisional assessment and seeking the views of the reporter, the department, Mr A, Mr B and the Commissioner
- preparing this Final report.

Standard of proof

The standard of proof I have applied in the investigation and this report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court’s decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;¹ and it is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

1. None of the parties provided a response to my provisional report.

Background and evidence obtained in the investigation

2. Delivery of state government information and communication technology (ICT) services is the responsibility of the department and OCIO. OCIO is a business unit within the department.
3. In 2003, the government commenced a program called ‘Future ICT Service Arrangements Initiative’ (**Future ICT**), in order to centralise strategic procurements for a range of across-government ICT related products and services.
4. In February 2006 following a procurement process, global information technology company, Company F was selected to deliver ICT services under what was then called the ‘Managed Network Services Purchasing Agreement’ (**MNS**). The contract was for 40 months with an optional extension of up to three years, commencing on 1 April 2006. There were extensions and variations to the contract over the following years in order to allow Company F to provide ongoing services and finally in 2014, disengagement services.³
5. In 2008, the Future ICT team became an operational unit within OCIO, and was rebadged as ICT Strategic Sourcing (**ICTSS**). Over the following years, ICTSS

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

³ For example, extensions and variations dated 29 July 2009, 23 July 2012, and in or around March 2014.

developed across-government ICT projects which were sequentially grouped in segments known as Tranches 1, 2 and 3.⁴ Tranche 3 is relevant to the investigation.

6. ICTSS services and procurements are conducted in line with the state government's procurement processes. The ICT Board has carriage of all across-government ICT procurement activity. The ICT Board is chaired by the Chief Executive of the department and its members include the Chief Executives from the Department for Health and Ageing, the Department for Communities and Social Inclusion, Primary Industries and Regions SA, the Under Treasurer and the Chief Information Officer of OCIO. A Procurement Steering Committee has responsibility for assisting the ICT Board to carry out its functions.
7. On 16 January 2012, the State Procurement Board approved the Tranche 3 Acquisition Plan and delegated its authority to the ICT Board.
8. The arrangements for the supply of the Tranche 3 services included four segments:
 - Network Carriage Services (approximately \$69m pa)
 - Network Management Services (**NMS**) (approximately \$19m pa). NMS concerns management of the government's Central Data Network, Local Data Network and Gateways
 - Network Internet Services (approximately \$2m pa)
 - Messaging and Business Communication Services (**MBCS**) (approximately \$10m pa).
9. The NMS procurement process is the focus of this investigation. I understand that the NMS delivers the same services as those under the MNS.
10. On 7 March 2012, OCIO and Mr A, Director of ICTSS within OCIO conducted an industry briefing in relation to Tranche 3 services and the procurement processes that would follow.
11. Mr A reports to the Chief Information Officer of OCIO, but he also works under and reports to the ICT Board. He is responsible for the full cycle of ICT procurement arrangements and contract management within OCIO. The Chief Information Officer of OCIO during the relevant period was Mr E.
12. On 24 April 2012, OCIO called for Expressions of Interest (**EOI**) in relation to all four Tranche 3 services set out above. The EOI for the NMS closed on 5 June 2012, and 21 responses were received. The NMS EOI evaluation commenced on 7 June and ended on 9 October 2012.
13. Company F, the incumbent, lodged an EOI for the NMS, and was one of seven shortlisted to receive a Request for Proposal (**RFP**). I understand Company F also lodged an EOI in relation to the MBCS, and was also shortlisted to receive an MBCS RFP.
14. On 18 December 2012, the NMS RFP documentation and evaluation plan was approved within OCIO and released on 8 January 2013 to the seven shortlisted suppliers. The NMS RFP closed on 19 March 2013. Responses were received from Company F, and two other companies, and four suppliers withdrew from the process.

⁴ See 'Strategic Procurement of ICT products and Services by the South Australian Government', dated 26 March 2012.

15. The ICT Board approved the final evaluation report for the NMS on 11 December 2013, and selected Company G as the preferred supplier.
16. The MNS agreement with Company F expired on 30 September 2014, after which Company G took over the NMS delivery.

The allegations

17. It is alleged by the whistleblower that :
 - after the EOI closure date but before the RFP period, Mr B, Director, StateNet Services, OCIO and Mr A covertly arranged to jointly travel with Mr C, Manager, SA, Company F, to New Zealand to view the New Zealand government's Company F ICT service delivery model called [...]
 - the tender documents issued by the OCIO do not contain any references to the [...] delivery model or even similar approaches of the model. However, if Company F proposed the [...] model in their RFP, then 'procedural fairness, integrity and objectiveness' did not occur in the tendering process and there may have been an 'unfair advantage over other respondents' due to the 'inside information' gained from the joint trip to New Zealand
 - no other potential suppliers who lodged an EOI for the NMS were informed of the trip or invited on the trip; and in this way and as a result of the information gained in the joint trip, Company F had an advantage in the NMS procurement process
 - the preferential treatment given to Company F by providing Mr C with the opportunity to showcase Company F's [...] product (when such opportunity was not given to other potential suppliers in the NMS tender process), tainted the probity of the NMS procurement process.
18. I note that although it was the incumbent supplier of the MNS delivery, Company F was not ultimately successful in securing the NMS contract. This fact however, does not diminish the concerns expressed in the allegations for the purposes of the investigation.

[...]

19. It is not in dispute that Mr A and Mr B travelled to New Zealand to learn about [...], and that they liaised with Mr C in their arrangements for the trip. It is also not in dispute that Mr C travelled to New Zealand at the same time as Mr A and Mr B, and went to meetings about [...] in New Zealand, at which Mr A and Mr B attended.
20. In his evidence, Mr A informed the investigation that the ICT [...] service delivery model in New Zealand is very different from the network managed ICT service delivery (MNS or the NMS) model in South Australia. Principally, in South Australia, the ICT infrastructure is owned by the government, whereas under the [...] model in New Zealand, this is not the case. Under the [...] model, a panel of performing suppliers own and establish the infrastructure themselves and supply the government with the service. Further, the [...] is a cloud based solution, unlike in South Australia.
21. Mr A told the investigation that the state government (via the ICT Board) did not intend to move to or adopt the New Zealand [...] delivery model into either the MNS contract or the NMS contract. Further, he said that there was 'no way' [...] could have any impact on the Tranche 3 services procurement, as the nature of the Tranche 3 services had been 'set in stone' well before the time of the New Zealand trip and they did not include [...].

He said he had no ability to change Tranche 3 services strategy, and that the strategy had been the result of extensive deliberations over the years; internal and external consultation with agencies; policy considerations by the Procurement Steering Committee; a decision by the ICT Board and then the State Procurement Board for approval to take the Tranche 3 to the market.

22. He said that there were certainly learnings from observing the [...] model during his and Mr A's trip to New Zealand, and that these may potentially influence future across-government ICT sourcing strategies in South Australia. However, he said that these learnings had no bearing on the Tranche 3 and MNS contract or NMS procurement or contract process.

Arrangements for the trip

23. Mr B told the investigation that he wanted to go on a study tour in New Zealand because of their different operations in their network space. He had learned of Company F's management of the new model of [...] service delivery in which network infrastructure was cloud-based and privately owned. He said that Mr C had encouraged him to go. He also said that he was also interested to look at the new work of other suppliers such as Company H in New Zealand. I note that Company H were not a respondent in the NMS tender.
24. Mr B said that he approached Mr E to seek approval for the trip, and this was formally granted. Mr B and Mr A told the investigation that Mr E had indicated that it would be good for Mr A to go; and accordingly, Mr B arranged the itinerary for the trip. Mr B said that he was mainly focused on speaking with the New Zealand government; and in order to find out relevant contacts, he worked with his personal assistant, through Company F and Company H.
25. Mr B's role is to manage ICT infrastructure within OCIO, which is government-owned. Mr B informed the investigation that although he had regular contact with Company F in its operation of the MNS contract, his role is to manage ICT infrastructure; and he was not directly involved in the Tranche 3 procurement process.
26. The department's documents provided to the investigation which were generated at the relevant time, show the 'activity justification' and 'areas of interest' on the trip were visiting the New Zealand government's Department of Internal Affairs, 'Core POP' (Company F), Company H and Company I, and considering the New Zealand's current ICT arrangements. The Travel Request form completed by Mr A states that he and Mr B wished to research and gain an understanding of the New Zealand government's [...] and infrastructure as a service initiative, as well as that government's broader strategic agenda. Mr A wrote that they would also be meeting with Company F, Company H and Company I's New Zealand counterparts.
27. The documents show that ultimately, OCIO made its own travel and accommodation arrangements for the trip. There were also earlier communications between Mr B and OCIO with Mr C which show initial reliance by OCIO on Company F to arrange the New Zealand connections and meetings.
28. For example, I note that there was email communication between OCIO and Mr C in July 2012 which shows that Mr C had arranged a tentative itinerary for OCIO, including

a Company F office visit and visiting New Zealand lead government agencies. The title of these emails is 'Visit to [...] New Zealand'.⁵

29. Further, by an earlier email dated 27 April 2012, Mr B informed Mr A that Mr C 'has offered to give us a guided tour'.
30. Although there is no mention of the Tranche 3 procurement in emails from Mr A or Mr B, emails between Australian and New Zealand Company F on 30 March 2012 suggest that Company F was certainly cognisant of the Tranche 3 tender process.
31. Further, Company F were aware of the benefits that the OCIO New Zealand visit might have for future reference. In one email to New Zealand, the Australian CEO of Company F wrote:

In addition to the Mgd NW services we already provide, the Govt. is providing counsel that we should propose a solution similar to the [...] service you currently provide to your Govt.
32. In a later email (in the same 30 March 2012 email chain) to the CEOs of Company F in New Zealand and Australia, Mr C says:

In parallel with this [sic] Key Stakeholder in the SA Govt network space has asked if I could arrange a visit to your fair country to speak with you about this and other core network services (such as the adoption of some of the Company I optical equipment) This will be a quick an [sic] important visit from an influence and understanding of the services you are offering as I expect he will be part of the RFT review panel in probably the first quarter of 2013.
33. In one (undated) email, Mr B informs Mr C of the dates of the trip and possible meeting dates; and he comments that he is letting Mr C know this 'in case you were planning a trip to coincide with this'. He comments that his personal assistant will contact Mr C about setting up a time to meet with Company F in Wellington.
34. By email dated 15 August 2012, I note that Mr B wrote to the Department of Internal Affairs introducing himself and Mr A and expressing an interest in the broader ICT strategic agenda of the New Zealand government, adding:

We have been in discussion with our local contacts in Company F, Company H and Company I and they seem happy to host us for meetings and site visits with their NZ counterparts. However it is our strong preference to primarily meet with the NZ Government staff.
35. On 24 August 2012, Mr B requested his personal assistant to organise meetings with Company F, Company H, Company I and Company J.
36. I note that Mr A and Mr B travelled to New Zealand on 25 September 2012 and returned on 28 September 2012. Documents show that the flights and expenses were paid for by the department. Mr A and Mr B stayed at the Bolton Hotel. Mr C stayed at a different hotel.
37. The documents show that Mr C also departed from Adelaide to Wellington on 25 September 2012, but on a different flight from Mr A and Mr B. I note that he returned from Wellington to Melbourne and Melbourne to Adelaide on the same flights as Mr A

⁵ For example, email from Mr C to OCIO dated 2 July 2012.

and Mr B on 28 September 2012.⁶ Mr C's flights and accommodation were paid for by Company F.

Meetings in New Zealand

38. Mr A informed the investigation that Mr C came to three meetings at which he and Mr B attended. These were their meetings with New Zealand Company F, Company I, and the Department of Police. (It appears that Company F arranged for the latter meeting with the officer in the department, who was responsible for 'brokering' [...] New Zealand with Company F.⁷) Also in attendance at the Company I meeting was a representative from New Zealand Company I and Company I in South Australia.
39. The meetings are documented in Mr A's diary thus:
- 26 Sept Meeting with Company I 9-10.30am
Attendees: up to three members of Company I NZ and an Adelaide representative
- Meeting with NZ Department of Internal Affairs 11-2pm
Attendees: officers of the NZ department
- Meeting with Company J NZ 3-4pm
Attendees: Service Manager and Supplier Relationship Manager
- 27 Sept Meeting ICT strategy with State Net Services 9-10am
Attendees: Chief Architect and two Principal Advisors, NZ Government ICT
- Meeting with Company F 11-2pm
Attendees: SA Manager [Mr C], NZ Chief Executive Officer, 5 other Company F staff from marketing, sales, finance, technical specialist, services product manager
- Meeting with Department of Police 5-6pm
Attendees: Chief Information Officer, sales officer, Company F SA Manager [Mr C], NZ CEO Company F
- 28 Sept Meeting with Company H 10-11am
Attendees: four Company H officers
- Meeting ICT strategy 12-2pm
Attendees: unknown
40. Mr A told the investigation that there was no discussion about the Tranche 3 services with Company F at these meetings. However, he said that when he gave a brief overview of how the ICTSS is set up in South Australia to the New Zealand government people, he gave a broad description about the Tranche 3 services.
41. Mr C's diary entries show 'SAG visit to [...] New Zealand [Mr B] and [Mr A]' for the days of 25-28 September 2012.

⁶ Qantas Airways QF0038, QF 0701 respectively.

⁷ Email from Ms D to Ms Helen Crkovnik (OCIO) dated 21 September 2012 (DD doc 21).

Probity concerns

42. Mr A told the investigation that he was not involved in any of the evaluations in relation to the Tranche 3 contracts. He sees none of the tender submissions that are received (they are kept in a locked cupboard); and the first he sees of the evaluation is a draft report signed by all of the team members.
43. He told the investigation that he was aware at the time of the trip to New Zealand that Company F had lodged an EOI, and that they had been shortlisted. He would have learned this not just from the Project Manager, but also because of his involvement with the Procurement Steering Committee and the ICT Board. He said that he had no communication at all with Company F about their EOI.
44. Mr A told the investigation that in the beginning when the trip was being arranged, he had some probity concerns about the tone of an email from Mr B, in which Mr B had said that Mr C had offered to give them a 'guided tour' in relation to [...]. He said he was concerned because, irrespective of the Tranche 3 procurement and Company F's interest, 'it's not good probity practice to actually - or be seen to be involved, if you like, in an inappropriate way or in a way that you could potentially be influenced, especially in my role, by a supplier'. Mr B confirmed Mr A's probity concerns; and he told the investigation:

I can remember a phone call where we said that's fine but we organise it, we are the ones running it and we will make all of our own arrangements. That's what we did.

45. Mr A said that he sent the email to his internal probity advisor, Mr K and that Mr K had advised that 'it was fine to go' on the trip, but it should not be organised with a supplier, but rather organised directly with the New Zealand government. Mr A said he conveyed this to Mr B.
46. I note Mr K's email to Mr A dated 2 May 2012 stresses the importance of probity:

On the matter of probity - it is imperative that we (the State) pick up all expenses - and all communication should be with the NZ government, not Company F - there can be no opportunity for anyone to perceive any advantage to, or impropriety with, Company F. Its not such an issue for [Mr B], but you and whom-ever you take with you ... need to be very careful.⁸

47. Mr B said that when Mr A voiced his concerns about his comments that Mr C was offering them a 'guided tour', he instructed his personal assistant to ensure that she organised their flights and accommodation, to use the across-government contract for travel, to lock in the Department of Internal Affairs and to set up the other meetings with other stakeholders.
48. Mr A said that he also found an email of Mr C's personal assistant problematic, in her comment that Mr C was going to 'accompany' him and Mr B on the trip.⁹
49. Mr A said that he responded to this by calling Mr C, and informing him that 'No, you're not accompanying us on a trip, this is a study trip which will be organised by us.' He said that he was also concerned that Mr C might be 'putting it abroad' that he and Mr B

⁸ Email from Mr K (OCIO) to Mr A dated 2 May 2012 (RS Exhibit 1).

⁹ Email from Ms D to OCIO dated 28 August 2012 (Attachment 28 to department's response).

were travelling together with Company F; and he therefore wrote an email to Mr C on 3 September 2012, as follows:

[Mr C]

[Mr B] and I plan to visit our colleagues in the NZ Government in the near future at their invitation. This is a reciprocal visit - they visited us some time ago.

As part of that visit, I understand that the relevant government people are making arrangements for us to meet with a number of their key suppliers - Company F being one.

The primary purpose is to meet our Government counterparts. I would prefer that our visits with suppliers is not discussed in the broader vendor community and that any limited communications reflect the correct position that any meetings with suppliers is secondary to this purpose.

Many thanks ...

50. It appears that Mr A was not the only party who was concerned about this, but an OCIO officer also voiced her concerns about Ms D's email to a colleague, in an email dated 3 September 2012, saying 'It may be perfectly innocent, however from an appearance point of view, which we are continually being advised is just as important in probity, it certainly doesn't look good.'
51. It is evident from the documents that at least from the perspective of Company F, that there was an expectation that flights to New Zealand would be synchronized. In an email to Mr C dated just before the flights on 10 September 2012, Mr C's personal assistant, Ms D asks Mr C how long they 'should wait for the Government to provide their flight details'; and that if there is no response by the following day, whether she should go ahead and book Mr C's flights on the arranged days.
52. In saying this, however, only three minutes earlier in an email, Ms D had informed the travel consultant that Mr C would not be accompanying the 'clients from Adelaide' on their flights or staying at the same hotel.
53. Mr A told the investigation that he did not formally advise the Chair of the ICT Board of the trip as he did not consider that there were any major probity concerns: this was a 'more of a day-to-day probity arrangement'. In his evidence, he stressed that:

...obviously I would got to a chief executive level board and tell them about a major breach because it would be exposing the state. This is, in my view - you know, there was a comment from [Mr B] in an email, a bit naïve perhaps, and sort of almost an offhand comment from a PA I think doesn't deserve going to five chief executives. That's the day-to-day thing that I manage all the time.
54. Mr A told the investigation that the ICT Board 'would be fine' with the probity of the situation; and that the Board would say 'Well done [Mr A], for managing it' as well.
55. He said that the probity issue was 'trivial' or a 'low order matter'. He said that he got advice, dealt with the probity issue promptly, and structured the trip appropriately. He said that the trip had no influence on the Tranche 3 procurement process; and that it would be impossible for any influence to occur in any event, 'So I think perhaps the whistleblower isn't fully across the facts'.

56. He said that his actions were in compliance with the ICT Strategic Sourcing Probity Plan, and that:

If I thought for a second that there had been a breach of probity, which there wasn't, I would have recorded that formally and certainly would have made my superiors aware of it.

57. He said he also discussed plans for the trip with Mr Colin Hackett from the Crown Solicitor's Office, who was providing legal services to OCIO. (The investigation has not verified if this was the case.)
58. Mr A said that before each of the meetings in New Zealand, he made a statement that he and Mr B could not discuss any matter relating to any market approach or any matter relating to the Tranche 3 arrangements. He would say that if people wanted to know anything about Tranche 3 or what ICTSS was doing, he would provide a card with an email address where enquiries could be made.
59. Mr A told the investigation that he and Mr B had no contact with Company F outside the meetings, and there were 'no meals or anything' with any supplier during the trip. There was no hospitality or gifts provided, except a working lunch with food platters, and he and Mr B had bought the architect of the New Zealand [...] model a coffee after that meeting. Documents received from the department and Company F appear to confirm this to be the case.
60. When the investigation questioned Mr A about why he chose to go to New Zealand when he did, given that he was apparently sensitive to probity concerns and the Tranche 3 procurement process, Mr A replied that he and OCIO 'were always in the market':

So if the implication is I shouldn't go anywhere where we have suppliers providing a service, I would never go anywhere to talk to anyone. Probity isn't about living as a mushroom, it's about managing the contacts that you do have to reduce risk and ensure fairness and equity. So no particular issue around the timing. Really, as I suggested, the trip was being discussed between [Mr B] and Mr E and Mr E suggested that I go on the trip. So it's as simple as that.¹⁰

61. Mr A also commented that his role as Director for ICTSS is to look at what is happening interstate and overseas to try and come up with strategies for future sourcing arrangements. He said he had attended up to 20 presentations from suppliers about their cloud-based services. Cloud-based services is a 'very topical thing in ICT globally'. It was 'natural' that he and OCIO would look at what New Zealand was doing given that it was very similar to Australia in a structural and governance sense.
62. I note from the OCIO Leadership Group meeting minutes of 16 October 2012, that Mr B gave a verbal briefing about the 'cloud first' strategy in New Zealand, and how Company F provide network services to the government, and infrastructure as a service is provided by suppliers. It appears that a report was prepared of the trip, which set out the New Zealand [...] approach and key learnings of the trip.¹¹
63. In response to the allegation that Company F was given preferential treatment by providing Mr C with the opportunity to showcase its [...] product, Mr A denied that this was the case as the New Zealand government business model is 'fundamentally

¹⁰ Transcript of Mr A dated 24 June 2014, p28.

¹¹ Response from the department to the Ombudsman dated 27 August 2013, attachments 5, 6.

different to that of SA, so Company F 'showcasing its product' has no direct relevance.' He submitted that 'At no time was a product relevant to the SA Government's NMS market approach showcased or discussed.'¹²

64. Mr B also informed the investigation that while he knew that Company F had lodged an EOI at the time of the New Zealand trip, he did not partake in the evaluation process of the EOI and nor did he discuss the EOI or the Tranche 3 processes with Company F. He was not directly involved in the Tranche 3 processes, but says that he would have had broad briefings at leadership meetings about where OCIO was up to with the Tranche 3 procurements.
65. Mr B told the investigation that he had liaised with Mr C about arranging the New Zealand trip, and getting contacts. He said he conveyed the dates of their travel to Mr C, as it was a 'good opportunity for him to introduce [people] to them.'
66. Mr B said that while he and Mr A connected with Company F in New Zealand, it was wrong to suggest that Company F had 'hosted' them, as they were doing their own 'study tour'. The trip was about his 'development', and 'lifting my vision for where we might be able to head with our networks'.
67. Mr B said there was no connection between [...] and Tranche 3, but he would have known at the time that Company F had lodged an EOI for the NMS. Mr B said that he did not think there were any probity concerns about the trip 'Absolutely not'. The trip was formally approved by Mr E. Mr B said:
- ...there was no advantage given to [Company F], because it was really learning about what [sic] New Zealand government were doing and how it was working, which was very helpful to me from a strategic directions point of view for the way we run our networks.
68. Mr B also recalled that Company F attended three meetings, at Company F, with Company I and with the New Zealand police. He said that there was no discussion around Tranche 3 except when Mr A would mention at the beginning of meetings that they could not discuss SA government procurements.
69. Documents provided by Company F show that Mr A and Mr B attended an office lunch at the Company F Wellington office on 27 September 2012, and also met at the Wellington Hotel Intercontinental Café that evening between 5-6pm with the New Zealand Police and the CEO of Company F (New Zealand) and Mr C. I note that there were queries from Mr B's personal assistant reflected in an email from Mr C's personal assistant (Ms D) to Mr C as to whether the 'out of hours' session would be a 'conflict of interest'.¹³
70. I note also that invitations from Company G for lunch or dinner in New Zealand were also rejected by Mr B's personal assistant on behalf of Mr B and Mr A on the basis of 'probity laws'.¹⁴

Relevant law/policies

71. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

¹² Written submission of Mr A provided to Ombudsman SA on 24 June 2014.

¹³ Email from Ms D to Mr C dated 31 August 2012.

¹⁴ Email from Mr B's personal assistant to Company H dated 11 September 2012.

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

72. Section 5(4) provides:

(4) *Maladministration in public administration*—

- (a) means—
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

Whether officers of the Department of the Premier and Cabinet committed misconduct or an act of maladministration in public administration in a trip to New Zealand with an incumbent supplier during a tender process

73. One question which is central to whether the probity of the NMS procurement process was tainted by the New Zealand trip is whether [...] was being considered by OCIO and the department in the NMS procurement process and the NMS contract service delivery, or indeed any of the Tranche 3 segments. I accept Mr A's evidence that it was not. Further, there is no indication in the documents provided by the department or Company F that it was.
74. Further, in response to the whistleblower's concerns, the investigation inspected all of the documentation in relation to Company F's EOI and RFP and the NMS procurement process, and there is no reference in any of the documents to the [...] service delivery model. In this respect, no questions of 'procedural fairness, integrity and objectiveness' arise; and nor does Company F's alleged 'unfair advantage over other respondents' as suggested by the whistleblower.
75. I also accept that in arranging the trip, there needed to be communication with not only the Department of Internal Affairs of New Zealand, but also Company F and Company G.
76. It is apparent from the evidence and documentation that no other potential suppliers who lodged an EOI for the NMS were informed of the New Zealand trip or invited on the trip. However, given that [...] was not pertinent to the NMS, in my view, this is not significant.
77. In saying this, the trip to New Zealand did indeed have a degree of 'covertness' to it, contrary to the view expressed in the department's response to the investigation. This covertness is evidenced by Mr A's email to Mr C on 3 September 2012 in which he asks Mr C not to advertise the trip amongst other suppliers. In my view, there was

nothing sinister in the trip, nor Company F assisting in arranging the meetings as it did, given the company's key role in [...] service in New Zealand and its knowledge of relevant contacts, and OCIO's interest in understanding [...] functionality.

78. I note the comments in the ICT Strategic Sourcing Probity Plan issued by the ICTSS in 11 April 2012 about the advantages of incumbency and unfairly enhancing these advantages towards the end of a contract, and communicating with bidders during the procurement process and ensuring probity:

Routine business meetings and social activities continue as usual, but ICTSS advisers and staff must exercise caution, and must not discuss the evaluation, selection procedures, or contents of any bid.¹⁵

79. On balance and on the basis of *Briginshaw*, the evidence also shows that Mr A and Mr B exercised sufficient caution so as not to prejudice the probity of the NMS procurement process. They did not breach the ICT Strategic Sourcing Probity Plan or the South Australian Public Sector Code of Ethics, and nor did they fail in their responsibilities or duties as public officers.
80. In saying this and while I appreciate the challenges that OCIO and Mr A, especially face in dealing with incumbent and potential suppliers when they are in a procurement process, in this instance, I consider Mr A and Mr B could have been more circumspect about the appearance of favouritism in the New Zealand trip.
81. In my view, the trip was not urgent; and if indeed the trip was a 'study tour' for Mr B's and OCIO's future ICT sourcing, I query why it could not have been postponed until the finalisation of the NMS tender process. There was clearly much at stake in the Tranche 3 NMS process, as evidenced by the sheer number of years of preparation for the Tranche 3 and the amount of public resources involved in the procurement process and the contract itself.
82. In my view, during their interviews in the investigation, both Mr A and Mr B were rather dismissive of the potential for the New Zealand trip and their communications with Company F to undermine the probity of the NMS procurement process. There mere fact that the whistleblower (whom I am prevented from naming) and one of Mr A's own staff had probity concerns lends support to my view. In addition, it would appear that Mr A himself had such concerns at the outset, as reflected in his email to Mr C on 3 September 2012.
83. I note that Company F appeared to see the trip as an opportunity to 'spruik their wares' whether about [...] or in relation to the Tranche 3 tender (it would be naive to think otherwise). Such was the interest of Company F that I note the Australian Company F CEO was involved in many of the communications.

Conclusion and final comment

In light of the above, I do not consider that either Mr A nor Mr B committed misconduct or an act of maladministration in public administration within the meaning of section 5(3) or (4) of the ICAC Act.

I comment that during interview with Mr B, the investigation learned that he had discussed the New Zealand trip with Mr A on receiving the Ombudsman's notice of investigation,

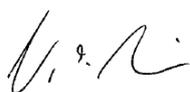
¹⁵ ICT Strategic Sourcing Probity Plan, 11 April 2012, p13.

despite the warnings of confidentiality under the ICAC Act which were set out in the notice. Mr B said that they had tried to remember the events of the trip as it had happened two years previously, and 'tried to step our way through what we did and who was at the meetings...'. Mr B stressed to the investigation that he discussed the trip with Mr A 'only to confirm that is what actually happened...' and that he '...found that helpful to refresh my memory'.

When the investigation asked Mr A whether it had occurred to him that the Ombudsman might think he had colluded by doing this, Mr A responded that it didn't occur to him. He said 'I felt that I needed to be clear in my mind what we did ...'

The investigation then questioned Mr A about this under oath. Mr A informed the investigation that Mr B had called him when he received the Ombudsman's notice of investigation, and he (Mr B) was 'very upset'.¹⁶ Mr A said he had told Mr B that they could not talk about the investigation, and that his (Mr B's) personal assistant would have all of the information if he needed to refresh his memory. However, he said that they talked about Mr B's feelings as Mr B had felt that the allegations were a 'personal attack' against him and that the complaint was 'vexatious'. He said that Mr B was trying to recall which suppliers they had met with in New Zealand, but they did not have an 'in-depth discussion'. Mr A said that he did not discuss the investigation with any other party.

While Mr B's and Mr A's conduct as outlined above was injudicious, I do not consider it prejudiced the integrity of the investigation. I am satisfied that both parties were made aware during interview of their serious error in judgement in discussing any aspect of the investigation, and it is hoped that that they are now more cognisant of their duty to keep the investigation confidential.



Wayne Lines
SA OMBUDSMAN

12 October 2015

¹⁶ Second transcript of Mr A dated 17 July 2014 at p6.