



**REPORT TO THE STATE SERVICES COMMISSIONER**

**ON INVESTIGATION INTO DISCLOSURE OF**

**A CLASSIFIED TELECOMMUNICATIONS STOCKTAKE REVIEW**

**PAPER TO TELECOM**

David Shanks  
Chief Legal Advisor  
State Services Commission  
16 May 2006

## Table of Contents

<b>EXECUTIVE SUMMARY.....</b>	<b>3</b>
<b>BACKGROUND TO THE INVESTIGATION .....</b>	<b>4</b>
<b>THE TERMS OF REFERENCE.....</b>	<b>4</b>
<b>TERMINOLOGY .....</b>	<b>5</b>
<b>THE INVESTIGATION PROCEDURE.....</b>	<b>5</b>
<i>Forensic evidence .....</i>	<i>6</i>
<i>Opportunity to comment .....</i>	<i>6</i>
<b>THE FOCUS OF THE INVESTIGATION.....</b>	<b>6</b>
<i>Mr Ryan’s evidence of the disclosure.....</i>	<i>7</i>
<i>The Telecom Employee’s evidence .....</i>	<i>8</i>
<i>Mr Ryan’s reason for providing the information to Mr Garty .....</i>	<i>9</i>
<i>Evidence of DPMC employees on the disclosed Cabinet paper.....</i>	<i>9</i>
<b>DPMC RELEVANT POLICY AND PROCESSES .....</b>	<b>10</b>
<i>Recruitment, induction and training processes .....</i>	<i>11</i>
<b>DPMC HANDLING OF CLASSIFIED DOCUMENTATION .....</b>	<b>13</b>
<b>HANDLING OF TELECOMMUNICATIONS STOCKTAKE PAPER .....</b>	<b>15</b>
<b>ADDITIONAL PART PAPER FOUND.....</b>	<b>15</b>
<b>RECOMMENDATIONS .....</b>	<b>16</b>
<b>APPENDICES .....</b>	<b>17</b>

# **Report to the State Services Commissioner on investigation into disclosure of a classified Telecommunications Stocktake Review paper to Telecom**

## **Executive Summary**

- 1 I have completed my investigation into the disclosure of classified information about the Government's Telecommunications Stocktake review to Telecom. My findings are summarised as follows:
  - 1.1 The Cabinet document relating to the Telecommunications Stocktake review was deliberately taken from the Department of Prime Minister and Cabinet ("DPMC") by Mr Michael Ryan, a messenger employed by DPMC, and given to a Telecom employee.
  - 1.2 Mr Ryan took the document from within a work area in DPMC on Tuesday 2 May. He passed the report to the Telecom employee, who was a personal friend of Mr Ryan's. That Telecom employee copied the document at home, and returned the report to Mr Ryan. Mr Ryan returned the paper to DPMC on Wednesday 3 May.
  - 1.3 Mr Ryan had legitimate access to the document, as he was responsible for delivering it to the confidential destruction bin.
  - 1.4 No other person played any role in assisting Mr Ryan to take the document from DPMC to the Telecom employee.
  - 1.5 The employee and ultimately Telecom were passive recipients of the document, having taken no action to seek it or to encourage Mr Ryan to provide it.
  - 1.6 The Telecom employee is an old friend of Mr Ryan. He plays no role in any government relations matter and is not a participant in government telecommunication policy discussions. He has never encouraged Mr Ryan to provide secrets and no payment of any kind has ever been offered or paid to Mr Ryan by his friend or any other Telecom employee to encourage the provision of information. No previous confidential information that Mr Ryan had access to at his workplace had been provided to the Telecom employee.
  - 1.7 Having received and viewed the document, the Telecom employee was immediately compromised. He showed the copy he had taken of the paper to Telecom's internal legal advisors and sought advice. The copy of the paper was provided to senior staff once its significance became apparent. Telecom's senior staff then contacted Ministers to acknowledge receipt of the document and to confirm its status.
  - 1.8 I consider that neither the Telecom employee nor Telecom has any fault in the acquisition of the document.
  - 1.9 The systems operated by DPMC were appropriate and followed properly by every person, other than Mr Ryan.
  - 1.10 Mr Ryan joined DPMC in October last year following a thorough process of reference checks and enquiry into his background. He had been fully informed of his responsibility to protect the confidentiality of Cabinet papers.

- 1.11 The Telecommunications Stocktake review was appropriately classified as sensitive, and was handled (by everyone other than Mr Ryan) in a way consistent with that classification.
- 1.12 With the benefit of hindsight, I recommend that DPMC review its system for disposal of sensitive Cabinet papers, but overall the system currently in place and its operation appears sound.
- 1.13 DPMC have been very cooperative at all times in the conduct of this investigation. Once Mr Ryan's role became apparent the Chief Executive, Mr Maarten Wevers and the Department acted firmly and promptly to ensure that security was restored.

## **Background to the Investigation**

- 2 The Telecommunications Stocktake review was initially distributed as Cabinet paper (CAB(06)150) that was considered by Cabinet on Monday 1 May 2006. The paper was referred by Cabinet to the Policy Committee, and was redistributed as a Policy Committee paper (POL(06)76). The Policy Committee was granted delegated power to act by Cabinet on the proposals in the paper. The paper proposed a number of significant policy steps to be taken in relation to the telecommunications sector, including "unbundling" of the local loop. The recommendations of the paper were adopted by the Policy Committee on Wednesday 3 May 2006 under the delegated power to act. These decisions were intended to be announced on Budget night.
- 3 On the afternoon of Wednesday 3 May 2006, a Telecom representative contacted the office of Hon. Mr Cunliffe, Minister of Communications, confirming that they had possession of a Cabinet paper detailing the Government's proposed regulation of the telecommunications industry, and in particular possible regulation of the company's fixed-line network. Telecom sought confirmation of the status of the disclosed Cabinet paper that had come into its possession.
- 4 As a result of learning that Telecom had received a copy of the Cabinet paper concerned, the Government was forced to convene an urgent media conference to announce the proposed regulatory changes. The original intention was for the changes to be announced on Budget night.
- 5 On the afternoon of Wednesday, 3 May 2006, Hon. Ms King, the Minister of State Services, verbally directed you to conduct an investigation into the unauthorised disclosure of information regarding the Telecommunications Stocktake Review to Telecom New Zealand Limited.
- 6 By letter dated Monday 8 May 2006 you appointed me, under section 25(2) of the State Sector Act 1988 ("SSA") to conduct the investigation into the disclosure of classified information and to report to you on my findings. Under section 25 of the SSA, the powers to summon witnesses and to receive evidence that are conferred on a Commission of Inquiry pursuant to the Commissions of Inquiry Act 1908 were conferred on me. This letter is attached as appendix A.

## **The Terms of Reference**

- 7 The full terms of reference were attached to a letter from the Minister of State Services to yourself dated 9 May 2006. The letter and the Terms of Reference are annexed as appendix B.

- 8 Under the Terms of Reference you were required to:
  - 8.1 Investigate how Telecom came to possess classified information about the Government's Telecommunications Stocktake review; and
  - 8.2 Report to the Prime Minister and the Minister of State Services on the outcome of the investigation.

## **Terminology**

- 9 The Cabinet paper that was disclosed to Telecom was a Cabinet paper (CAB (06)150) with the heading "Telecommunications Stocktake", dated 28 April 2006. A number of copies of this paper were distributed to Ministers and Advisors. The paper was also redistributed with a Policy Committee top sheet (POL (06)76) on Tuesday 2 May 2006. In this report I refer to the various copies of this paper that were created and distributed generally as "the Telecommunications Cabinet paper". I am satisfied that I have identified the particular paper that was disclosed to Telecom (CAB (06)150 number 29). I refer to this paper particularly as "the disclosed Cabinet paper".
- 10 The investigation involved a number of aspects of the functions of the Department of the Prime Minister and Cabinet ("DPMC"). DPMC is not the office of the Prime Minister (as is often supposed) but is a politically neutral Public Service department tasked with coordinating Public Service support to the Prime Minister and Cabinet. The investigation also required evidence in relation to the particular functioning of the Cabinet Office, which is a branch of DPMC concerned with operational support for Cabinet. I also looked at aspects of the operation of the Policy Advisory Group ("PAG"), the branch of DPMC which exists to provide advice for the Prime Minister on policy matters.

## **The Investigation Procedure**

- 11 After considering the Terms of Reference and the available information (including in particular the information that had been provided at an early stage by Telecom's Group General Counsel) it was clear to me that I should proceed to immediately interview the particular individuals implicated by that information as being involved in the unauthorised disclosure.
- 12 I spoke first with Mr Peter Garty, an employee of Telecom New Zealand Limited. This interview took place on 8 May 2006 at the offices of the State Services Commission. I was then able to speak with Mr Michael Ryan, a departmental Messenger employed by DPMC, on 10 May 2006.
- 13 On 11 May 2006 I spoke with Diane Morcom, Secretary of the Cabinet and Andrew Kibblewhite, Director of the Policy Advisory Group, the relevant Policy Advisor within the Policy Advisory Group, as well as Brent Anderson, Corporate Services Manager.
- 14 All of the above witnesses gave their evidence on oath. The witnesses were made aware that they were entitled to be accompanied at the interviews by Counsel and Mr Garty and Mr Ryan gave their evidence with Counsel present. Mr Ryan also provided a written statement at interview which had been prepared previously, and read the contents of that statement under oath. Mr Garty provided me with some additional information subsequent to his interview in response to two further questions I put to him in writing.

- 15 While at DPMC, I also spoke to a number of other officers who provided me access to inspect the recovered copies of the Telecommunications Cabinet paper and provided further information in relation to DPMC policies and procedures. They and Mr Anderson were able to provide me with helpful reference documentation, including relevant copies of Codes and practice guidelines.
- 16 I received full cooperation from all of the witnesses. I note in addition that Mr Ryan attended an interview with me at short notice and despite having a medical certificate saying he was unwell. Indeed, in order to complete this investigation in as short a time as possible, I often required individuals to assist me at short notice, and all parties were helpful and generally met the timeframes that I required of them.

### ***Forensic evidence***

- 17 In the course of my investigation I considered whether forensic evidence would be required to inform my investigation. From the evidence I received, I was satisfied that I was in a position to identify the disclosed Cabinet paper and the means by which it found its way to Telecom. I accordingly concluded that additional forensic evidence was not necessary.

### ***Opportunity to comment***

- 18 Where I formed a provisional view that I considered could be perceived as being adverse to the interests of a witness or as being critical of them, I provided that witness with a limited opportunity to comment on the relevant section of my draft report, and took their comments into account before submitting this report.

### **The Focus of the Investigation**

- 19 At the time I was appointed to conduct this investigation, the State Services Commissioner had already received a letter dated 5 May 2006 from Mark Verbiest, General Counsel for Telecom. This letter contained a summary of Telecom's own investigation into the release of the Telecommunications Stocktake paper to one of their employees. This letter identified the source of the leak as being Mike Ryan, a Parliamentary Messenger (sic), who had a long term friendship with a Telecom employee. A copy of the letter from Mr Verbiest is annexed as appendix C.
- 20 It was clear that the initial focus of the investigation would need to be on determining whether the facts as Telecom had presented them were accurate. In addition to providing a robust, independent assessment of the matters presented by Telecom, it was also clear that the relevant security safeguards and procedures in place within DPMC needed to be considered to determine whether they contributed in any way to the breach of security. Similarly, the recruitment, induction and training processes for Mr Ryan would also clearly be relevant to determining whether there had been any failure in departmental process that contributed to the unauthorised disclosure of information.
- 21 In the circumstances I determined that it would not be desirable or appropriate for me to endeavour to undertake an audit of the handling of all copies of the relevant Telecommunications Stocktake paper. Indeed, on the facts as I have determined them, this would not have fallen within the frame of the Terms of Reference.

### ***Mr Ryan's evidence of the disclosure***

- 22 Mr Ryan provided me with a signed letter dated 10 May 2006 headed "Inquiry into disclosure of information" setting out his summary of relevant facts. Nothing in my investigations causes me to diverge in my conclusions in any significant way from the facts as Mr Ryan presented them in that letter. Mr Ryan also repeated the comments in his letter on oath in evidence before me.
- 23 I summarise the evidence provided to me by Mr Ryan as follows:
- 23.1 Mr Ryan has been a long term government employee, having held a variety of government positions from 1970 until the late 1990's. He was then self employed for a number of years but returned to government service in October 2005, when he became a Messenger for the Department of the Prime Minister and Cabinet.
- 23.2 Mr Ryan and his wife have been long term friends of a Telecom employee, Mr Peter Garty and his wife. This friendship has existed for some 15-16 years. Mr Ryan explained how the friendship had grown over the years since the couples initially met through their children being at school together. Mr Ryan described Mr Garty and his wife as "close friends" and described how the couples had travelled overseas together, and shared an interest in rugby. Mr Ryan and Mr Garty were also members of a cycling group and often saw each other in the course of weekend rides with that group. Mr Ryan and Mr Garty were also involved in a fundraising venture through that cycling group, which involved them meeting together with other members on a regular basis.
- 23.3 On Monday 1 May 2006, Mr Ryan was carrying out his ordinary duties as a Messenger with DPMC. On that day his role involved assisting in the Cabinet Office with distribution of necessary mail and papers. In the course of his normal work, he saw an agenda either for the Cabinet meeting that day, or for the Policy Committee meeting to be held on Wednesday 3 May. He noticed that the agenda included consideration of a telecommunications review.
- 23.4 That evening Mr Ryan visited the home of Peter Garty. Renovations were being undertaken at that home, and carpet was being removed. Mr Ryan had previously discussed the possibility of his collecting some of the carpet for his own use. While Mr Ryan was being shown the work and the carpet by Mr Garty's wife, Peter Garty arrived home. During the course of their conversation, Mr Ryan mentioned to Mr Garty that Cabinet was to discuss the Telecommunications Stocktake. This conversation was extremely brief.
- 23.5 On Tuesday 2 May 2006, Mr Ryan was undertaking his normal duties in the offices of PAG. Along with making deliveries of documentation, Mr Ryan's duties included removing confidential documents intended for shredding from trays designated for this purpose. Mr Ryan saw the Telecommunications Stocktake document in such a tray in an office shared by three PAG Advisors on the 8<sup>th</sup> Floor of the Beehive. Mr Ryan took the document to the Messengers room, where the locked bin for material for shredding was located. Instead of placing the document in that locked bin, he placed it in his personal bag. He removed the disclosed Cabinet paper from Parliamentary premises when he left work at the end of the day.
- 23.6 That evening there was a meeting of the cycling group at the home of a member of the group. There were some half a dozen or so people at the meeting who were discussing matters relevant to the fundraising effort that was being undertaken. Mr

Ryan and his wife travelled to the meeting in their car, and collected Mr Garty and another member of the group to take to the meeting. Mr Ryan also took with him the Telecommunications Stocktake paper, in a manila folder.

- 23.7 The meeting concluded at approximately 10.45-11.00 pm. As they left the meeting, but before they got into Mr Ryan's vehicle, Mr Ryan passed to Mr Garty the manila folder containing the Telecommunications Stocktake paper. When he gave Mr Garty the folder he told him that it was for his eyes only and stressed it was not to be copied. He also asked Mr Garty to bring it back to him first thing the next morning.
- 23.8 The document was returned to Mr Ryan by Mr Garty at approximately 7.00-7.30 am on the morning of Wednesday 3 May 2006. Mr Ryan told me that there was only a very brief exchange between them at that time, with Mr Ryan reiterating to Mr Garty that the document had been for his eyes only and he trusted that Mr Garty had not copied it.
- 23.9 Later that morning Mr Ryan went to work as normal and returned the disclosed Cabinet paper to the shredding bin that it was originally intended for.

### ***The Telecom Employee's evidence***

- 24 Mr Peter Garty has been employed by Telecom for over eight years as a Group Controller, Finance, reporting to the Chief Financial Officer for Telecom. That has been his role for the entire term of his employment with Telecom. He has not held any political lobbying role with Telecom.
- 25 Mr Garty confirmed in all relevant respects the evidence outlined above from Mr Ryan. He did not recall the further comments of Mr Ryan when the document was returned early on the morning of Wednesday 3 May, but I do not attach any significance to that. Mr Garty's evidence is also consistent with the account of facts summarised in Mr Verbiest's letter of 5 May 2006. I summarise the additional relevant matters in Mr Garty's evidence as follows:
- 25.1 Mr Garty was feeling very tired at the cycling group meeting on the evening of Tuesday 2 May, and had also consumed a number of glasses of wine at that meeting. When he returned to his home and looked at the document that Mr Ryan had provided him, he found it difficult to focus on. Accordingly he decided to copy the document on his personal photocopier and take another look at it in the morning.
- 25.2 On considering the copy of the disclosed Cabinet paper the next morning, Mr Garty resolved to take the document to the Telecom offices and show it to his employer's General Counsel. When he arrived at work, he recopied the first page of the disclosed Cabinet paper sideways, removing the Cabinet header and number of the document. He ripped up the original complete copy of the front page and placed it in a shredding bin. He did this because of his increasing sense of discomfort regarding his possession of the disclosed Cabinet paper. He was not able to speak to Mr Verbiest right away, however he was able to show the document to Mr David Knight, another senior internal legal advisor for Telecom. It was decided that the paper needed to be referred to Telecom's senior management.

### ***Mr Ryan's reason for providing the information to Mr Garty***

26 In Mr Ryan's letter and evidence to me, he made it clear that he provided Mr Garty with the document through some misguided sense of friendship. In his letter of 10 May 2006 he states:

"It was because Peter and I were such close friends that I gave the document to him. I would not have done that if we were not close friends. I had given it to Peter for his interest, not to benefit him, me, or Telecom.

I was completely shocked when I read about these matters in the newspaper, I never expected them to surface. I regret very much what I did and realise now how foolish I have been, regardless of the publicity.

I would like to make it clear that I received no benefit from what I did, financial or in any other sense. My motive was not to damage the Government. I have no desire to cause the Government or my Department any harm whatsoever. It was also not my desire to give Telecom any advantage."

27 Both Mr Ryan and Mr Garty were clear to me in their evidence that nothing of this kind had ever happened before. Mr Garty was unequivocal that he had never asked Mr Ryan to provide him with any information that Mr Ryan had access to through his position at DPMC. Nor had he offered Mr Ryan any gift, payment or other inducement to provide such information. Mr Ryan had previously not volunteered such information to Mr Garty.

28 Mr Garty did advise me that at a subsequent meeting between himself and Mr Ryan on Sunday 7 May 2006, Mr Ryan did indicate that he thought that Mr Garty might have been in a position to "take care of" his Telecom shares with the benefit of the information provided. This is denied by Mr Ryan. For the purposes of this report, it is not necessary to make any determination on this point. It is clear from the evidence provided to me that Mr Ryan provided the document to Mr Garty through some misguided sense of friendship, believing that it would be of interest or use to him.

29 Mr Ryan did not intend Mr Garty to copy the Telecommunications Stocktake paper or to provide it to his employer. This was naïve. As soon as Mr Garty had had a chance to gain some idea of the contents of the paper, he had been placed in a compromised position. It was reasonable for him to copy the document and seek advice from his employer's legal advisors.

30 I am satisfied from the evidence provided to me by Mr Ryan that he did not disclose the Telecommunications Stocktake paper to any other person, or use the information contained in it personally. His evidence to me was that he did not read the document other than to gain the most general sense of its content.

31 I conclude on the basis of the evidence provided to me by both Mr Ryan and Mr Garty that both Mr Garty and Telecom were passive recipients of the paper, having taken no action to seek it or to encourage Mr Ryan to provide it. I consider that neither Mr Garty nor Telecom has any fault in the acquisition of the document.

### ***Evidence of DPMC employees on the disclosed Cabinet paper***

32 As part of my further inquiry into whether other available evidence supported the account provided by Mr Ryan and Mr Garty, I spoke to the relevant Advisor within the PAG. The Advisor provided evidence to me that he had been closely associated with the production and preparation of the Telecommunications Stocktake paper. He had been in possession of various draft versions of the paper, and had also been provided with the

Telecommunications Stocktake paper CAB (06)150, numbered 29. This had been delivered to him in a sealed envelope on Friday 28 April 2006.

- 33 This paper was subsequently considered by the Policy Committee. On Tuesday 2 May, the Advisor had received a POL version of the same Telecommunications Stocktake paper. He accordingly placed his Cabinet paper number 29 in a tray for shredding. In my subsequent inspection of the office shared by the Advisor and two other Advisors, I noted that this tray was placed on filing cabinets near the Advisor's workstation and was labelled "confidential shredding".
- 34 I showed the Advisor the copy of the disclosed Cabinet paper that had been provided to the State Services Commissioner by Telecom. On inspection of that paper, he noted that while the cover page of the document had been photocopied sideways so the Cabinet Crest and the number of the document had not been reproduced, the process of photocopying had involved folding the document over so that on some pages the very top of the front page could just be seen. On some reproduced pages there was evidence of handwritten initials "XX". He noted this would have been consistent with his copy. He also noted that approximately five pages were missing from the Telecom copy.
- 35 I also spoke to Cabinet Office staff about the process by which they had recovered all of the numbered Cabinet and Policy versions of the Telecommunications Stocktake paper. I was shown to a secure area vault, where all of the original papers had been securely stored after being collected back from Minister's offices, the Department's and the Cabinet Office areas where they had originally been sent. Document number 29 was included in the recovered CAB (06)150 papers. I noted that at the top of the front page of that particular document were the Advisor's initials. The writing and initials were consistent with the partial copy showing through on the pages of the copy of the disclosed Cabinet paper provided by Telecom.
- 36 I also spoke to a DPMC staff member about the role that she played in recovering several of the CAB and POL versions of the Telecommunications Stocktake paper on the 8<sup>th</sup> floor of the Beehive, subsequent to the leak becoming known. She had located and returned a number of these documents, including the CAB paper numbered 29. She was unable to specifically remember where she had recovered that particular document from, although she had recovered some papers from a shredding bin. Her recollection was that she had only recovered an unnumbered document and partial documents from the shredding bin. In my view she either did retrieve the document numbered 29 from the shredding bin where Mr Ryan advised me he deposited it, or she collected it from some other area where he had left on the 8<sup>th</sup> floor.
- 37 I have concluded that there is no material inconsistency between the evidence I gathered from the staff at DPMC, and the account of the removal of the Telecommunications Stocktake paper provided to me by Mr Ryan.

### **DPMC Relevant Policy and Processes**

- 38 As part of my investigation I considered it within the Terms of Reference for me to examine whether there was any default in DPMC policies, procedures or actions that caused or contributed to the leak of the Telecommunications Stocktake paper. In the course of my investigation I obtained and considered evidence in relation to DPMC's recruitment, induction and training processes both in general and in relation to Mr Ryan specifically. I also obtained evidence in relation to DPMC processes relating to the

handling and security of classified material in general, and in relation to the handling of the Telecommunications Stocktake paper specifically.

### ***Recruitment, induction and training processes***

- 39 The evidence I have seen shows that DPMC has in place robust recruitment processes. In the case of the recruitment of Mr Ryan this process included obtaining four reference checks. (Two undertaken by the recruitment agency assisting with the process, and two being undertaken by Corporate Services). The referees were specifically asked about Mr Ryan's personal integrity in relation to confidential information and this had been noted as a strong point. In a previous government sector job Mr Ryan had been privy to Cabinet papers and the referee noted "to my knowledge he never took advantage of that". In addition to the reference checking, a criminal record check was carried out, and a psychological assessment was undertaken by a registered psychologist.
- 40 At the conclusion of the recruitment process, the DPMC recruitment panel were satisfied that Mr Ryan was the best candidate for the departmental Messenger vacancy. During the course of the recruitment process it was noted that Mr Ryan had close associations with senior government officials and representatives, and this was seen at the time as providing some additional comfort in relation to his appreciation of the importance of confidentiality.
- 41 As a DPMC Messenger, Mr Ryan was required to hold a security clearance to handle Sensitive and Restricted classified material. Departments have responsibility for approval for that level of clearance (see the SIGS manual referred to in paragraph 55 below) and in the current case DPMC had given Mr Ryan that clearance. In addition the necessary form to obtain a Secret clearance had been provided to the Security Intelligence Service and confirmation that the vetting was in train was provided by the NZSIS on 26 January 2006. The SIS vetting process for Mr Ryan had not been completed at the date of writing this report.
- 42 It is clear from the DPMC security clearance policy documents provided to me, that it is accepted that for all levels of security clearance other than Top Secret Special clearance, an employee can commence work but should not normally have access to classified information until the clearance is obtained. The practice within DPMC is that messengers are started on normal duties pending receipt of the security clearance. If the required clearance is not obtained or maintained, then employment may be terminated.
- 43 I would note that I do not find that there is any breach of process in DPMC employing Mr Ryan to carry classified documents (amongst other things) while the security clearance check was pending. Mr Anderson provided evidence to me that this was standard practice, in light of the fact that such security clearances could often take some six months or so to process. It would be impracticable to have a departmental Messenger stood down from duty for that length of time pending confirmation of the check. Mr Anderson also noted that the department had confidence in the effectiveness of its recruiting procedure and noted that they had never had a security clearance turned down for one of their employees. I note that if not for the actions of Mr Ryan in relation to the Telecommunications Stocktake paper, I am not aware of any fact that would lead me to believe that he would not have obtained the necessary security clearance.
- 44 The evidence provided to me in relation to DPMC's induction processes indicate that they are robust. All staff are required to sign a declaration of confidentiality, obliging employees not to disclose or discuss information obtained through their employment with any person who is not entitled to the information, as well as promising to maintain

confidentiality in respect of all matters that may come to their knowledge in the course of their employment and also promising never to disclose any information from DPMC to anyone except when performing their duties or required by law. The declaration contains an acknowledgement that these promises must continue to be honoured even after their association with DPMC has ceased. This declaration was signed by Mr Ryan on 20 October 2005 (attached as appendix D).

- 45 As part of the ordinary induction process, Mr Ryan was also required to read the “Information Systems Code of Practice” and to abide by the principles in that Code of Practice. While this particular Code of Practice relates to use of modern electronic information systems in particular, the agreement that Mr Ryan signed on 22 December 2005 required him to understand and agree that he would not breach confidentiality. The signed Information Systems Code of Practice agreement dated 22 December 2005 is attached as appendix E.
- 46 The DPMC pre-commencement induction checklist confirms that Mr Ryan was provided with a DPMC Code of Conduct, as well as a New Zealand Public Service Code of Conduct. The evidence provided to me by Mr Anderson was that in the ordinary course of events, the important aspects of those Codes are summarised for new employees, and they are informed that they are expected to familiarise themselves with the Codes. The general practice is to stress the requirements in relation to confidentiality and classified information. I attach the relevant page 10 of the DPMC Code of Conduct and page 16 of the Public Service Code of Conduct as appendices F and G, respectively.
- 47 The job description for the position of Messenger within DPMC identifies seven core competencies. The fifth one of these is “acts with integrity”. The first behavioural indicator for that core competency is “you maintain confidentiality”. Confidentiality is also a critical requirement contained in the individual employment agreement that Mr Ryan entered into with DPMC on 19 October 2005. I record clause 13 of that IEA as follows:

**13. Confidentiality**

- 13.1 Unless it is a requirement of your position, you may not disclose to any other person, other than a person employed by the Department, any information regarding the business or function of the Department other than when expressly requested to do so by the Chief Executive or a representative of the Chief Executive.
- 13.2 You may not at any time (including after the termination of this agreement) use any confidential information obtained in the course of your employment regarding the business or function of the Department for any purpose that is likely to be detrimental to the Department or the Ministers and officials it serves.

- 48 Under Mr Ryan’s employment agreement with DPMC the terms and conditions of his employment incorporated additional terms and conditions set out in the document called “Your employment with the Department of the Prime Minister and Cabinet (1999)” that was enclosed with the letter of 19 October 2005. That document also contained express reference to the Public Service Code of Conduct obligations at page 2.
- 49 On 27 January 2006 Mr Ryan signed an authorisation form to his existing terms and conditions of employment, in which he agreed to a variation of his existing employment agreement to include coverage by the DPMC personnel manual “Your employment with the Department of the Prime Minister and Cabinet (2006)”. This replaced the terms and conditions of employment as set as out in the 1999 version of the personnel manual. This document contained express reference to the DPMC Code of Conduct (at paragraph

3.4) and security and confidentiality (at paragraph 4.3) which in effect repeated and reinforced the confidentiality expectation contained in the IEA as set above.

- 50 In summary, within the first three months of his employment, Mr Ryan had signed or been provided with no less than six documents referring expressly to his obligations of confidence in relation to the information and material he had access to in the course of his employment. Mr Anderson also told me about the overall culture of confidentiality and discretion that was prevalent throughout DPMC. The evidence I received, and my observations while at the premises of DPMC were all consistent with the proposition that DPMC departmental staff are highly aware of the need for strictest confidentiality.
- 51 In his evidence to me, Mr Ryan clearly accepted that he knew he was not supposed to provide information that he had access to at his work to any other person without proper authorisation. That is inescapable from the material he had been given and signed referred to above. He also was clearly aware that he was acting in breach of departmental policy and expectations in providing the Telecommunications Stocktake paper to Mr Garty, and he expressed remorse and regret about that action and expressly apologised to his Chief Executive, Maarten Wevers, his fellow employees, the Minister of Communications, the Prime Minister and the Government.
- 52 When asked about whether he had received any training in relation to security standards or the obligations of confidentiality, Mr Ryan said that he'd no specific training "other than by inference". He indicated to me that he was aware of the Public Service Code of Conduct, but was not aware that there was a DPMC Code of Conduct. In my view, this reflects more a lack of serious attention by Mr Ryan to his clear obligations, rather than any fault on the part of DPMC to fail to bring these obligations to Mr Ryan's attention.
- 53 Mr Ryan knew or ought to have known he was in a position of great trust within DPMC. As a departmental Messenger he was always going to be in a position of having access to extremely sensitive and confidential information. His obligations with respect to such information were made abundantly clear to him. I conclude that the responsibility for this serious breach of security is his and his alone.

### **DPMC Handling of Classified Documentation**

- 54 I considered it appropriate in the course of my investigation to inquire into whether there was any lapse in handling of the disclosed Cabinet paper, or any identifiable weakness in the systems of DPMC for handling classified information, that may have contributed to the unauthorised disclosure.
- 55 The Telecommunications Cabinet paper was classified information. The "Security in the Government Sector" ("SIGS") manual issued by the DPMC in 2002 provides a useful background on information classification. At chapter 3-3, the SIGS manual notes the following:
10. In general, information to be protected is either:
    - **"Policy and Privacy"** information, for which compromise does not threaten the security of the nation, but rather the security or interests of individuals, groups, commercial entities, government business and the community.
    - **"National Security"** information, for which compromise could affect the security or defence of New Zealand or the international relations of the government of New Zealand.

56 Security classifications for material needing protection on “policy and privacy” grounds include the classifications “In-Confidence” and “Sensitive” (with “Sensitive” being the higher classification of the two requiring stricter handling standards). The SIGS manual sets out guidelines for the classification of sensitive material and its handling at annex B of chapter 3-10 (attached as appendix H). I note that that guidance indicates that the “Sensitive” classification appears to be the appropriate classification level for the Telecommunications Stocktake paper.

57 Two fundamental and relevant principles contained in the SIGS guidelines are the “need to know” principle and the “need to retain” principle:

**“Need to know” principle**

Fundamental to all aspects of security is that the only people who receive classified information are those who need it to complete the business in the hand. Thus, employees receive access to classified information:

- Only because they “need to know” it to complete their duties
- Not because it would be convenient for them to know
- Not by virtue of their status, position, rank or level of authorised access.

**“Need to retain” principle**

Only retain classified documents, especially circulated drafts, while they are in use. Once a classified document or draft is no longer needed, either return it to the originator or destroy it.

“Need to retain” principle should include:

- Keeping all holdings of loose classified material to a minimum
- Annual reviews of holdings of loose classified material
- How to return or dispose of unneeded classified material

(ref: Chapter 4-2 and 4-3 SIGS)

58 The security guidance contained in the SIGS manual is reflected in the DPMC Departmental Security Policy (May 2004) (“DSP”). The DSP in particular reflects the “need to know” principle outlined above, and the classification system for security classification. In terms of particular policy guidance for handling classified material, the following excerpts from the DSP are of particular relevance:

**“Clear desk; clear screen; clear whiteboard policies:**

When a workstation is unattended the desk must be clear of any classified information and the computer must be accessible only through password entry. At the end of the business day all classified hard copies should be stored in locked storage.

**Disposal and destruction:**

Classified materials should be disposed of or destroyed according to the handling requirements establish for its security classification. Detailed methods and options are specified in the manual *Security in the Government Sector*. In general Sensitive, Restricted and Confidential information may be disposed of in the security disposal bins. Confidential information may be disposed of in bins or shredded; secret and top secret information should be destroyed, under supervision by the BSO, within the Department – eg: shredded.”

## **Handling of Telecommunications Stocktake Paper**

- 59 I was provided by DPMC with evidence about the process for the Cabinet Office's handling of classified documents. The Cabinet Office is typically provided with an orange top sheet that contains instructions to the Cabinet Office for the handling and distribution of a given classified paper. In this case, the orange top sheet identified the classification of the Telecommunications Cabinet paper as being "Commercial Sensitive" and "Personal to". The "Personal to" additional classification direction indicated to Cabinet Office staff that this particular paper was to be delivered in envelopes sealed securely with tape.
- 60 The "Personal to" classification also requires that only three copies of the paper should have been distributed to PAG as opposed to the more usual four (the usual general filing copy is not sent for such papers). On this occasion, four copies of the Telecommunications Cabinet paper were provided to PAG. On my findings of fact in relation to how the paper was subject to an authorised release, this oversight was not material. Although the disclosed Cabinet paper was one of the papers issued to PAG, that particular copy would always have been required to be delivered to that group.
- 61 The breach of security with this particular paper occurred not during the process of distribution and delivery, but following that, when it was placed in a tray for confidential shredding. There is nothing that I have seen that leads me to believe that placing a document with this classification in such a tray for collection and shredding is in breach of DPMC policy for handling such documents. However, I would observe that the "need to know" principle could clearly lead to the conclusion that any classified document that was considered sufficiently sensitive to warrant enveloping on delivery, would also warrant enveloping or covering when being placed in the tray for collection and disposal. I would recommend in light of the events surrounding this unauthorised disclosure, that DPMC reconsider its policies in relation to practices around the physical collection for disposal of such documents.
- 62 I wish to make it clear that this recommendation should not be seen as anyway as a criticism of the actions of the relevant Advisor in placing the document in his "confidential shredding" tray for disposal without enveloping it. It was clear from the evidence I received from this Advisor that he was perhaps more acutely aware than anyone as to the sensitivity of this document and the importance that it be kept confidential. I was also satisfied from my discussions with the head Messenger that a policy is strictly adhered to whereby such trays for shredding material often may be cleared more than once in a day, and are always cleared of any material at the end of the day.

## **Additional Part Paper Found**

- 63 Cabinet Office staff were assiduous in collecting up all issued copies of the Telecommunication Stocktake review, once they were notified that there had been an unauthorised disclosure of it. However, on 11 May 2006 I was advised that a further copy of this paper had been located behind a photocopier located in Hon. Mr Cunliffe's office.
- 64 I collected this additional paper on 12 May 2006, and spoke to Hon. Mr Cunliffe's Senior Private Secretary about the circumstances in which it was found. On inspection, I noted that the copy that had been found was a copy of the Telecommunications Stocktake paper numbered 31 – the same paper that had been copied for distribution to the media in Hon.

Mr Cunliffe's office on the afternoon of Wednesday 3 May 2006. It is clear to me that this additional copy found fell behind the photocopier by accident during the rush to provide the media with copies on that date.

- 65 The care taken in the collection of this further copy and immediately notifying the State Services Commission is further evidence of the high degree of concern and seriousness with which everyone involved treated this matter. It also does raise a question for further consideration by both DPMC and Ministers and their staff in respect of the best process for creating further copies of classified documents in urgent cases. There could be benefit in having all such copies created by the Cabinet Office in accordance with their processes. However this may not be practicable in all cases and my recommendation is simply that such copying processes be considered further by DPMC in light of this experience.

## **Recommendations**

66 In summary, I recommend that:

- 1 DPMC considers its policies in relation to practices around the physical collection for disposal of classified documentation in light of the findings of this report and with particular regard to the 'need to know' principle;
- 2 DPMC considers steps taken to create copies of classified documentation for media release in light of the findings of this report in order to determine whether any additional policy or communications with Ministers on that issue may be appropriate.

David Shanks  
Chief Legal Advisor  
State Services Commission

16 May 2006

## Appendices

- A Letter - 8 May 2006, Mark Prebble, State Services Commissioner to David Shanks, Chief Legal Advisor – Appointment under section 25(2) State Sector Act 1988.
- B Letter – 9 May 2006 – Hon Annette King, Minister of State Services to Mark Prebble, attaching Terms of Reference.
- C Letter – 5 May 2006 – Mark Verbiest, Group General Counsel, Telecom, to Mark Prebble.
- D Department of Prime Minister and Cabinet – Declaration of Confidentiality signed by Mr Michael Ryan on 20 October 2005.
- E Department of Prime Minister and Cabinet – Information Systems Code of Practice Agreement signed by Mr Michael Ryan on 22 December 2005.
- F Page 10 of the Department of Prime Minister and Cabinet Code of Conduct.
- G Page 16 of the New Zealand Public Service Code of Conduct.
- H Extract from Security in the Government Sector – chapter 3-3, Annex B.