



MEMORANDUM

[IN CONFIDENCE]

To: Debbie Power, Peter Hughes
From: Ken Stephen, Chief Legal Officer
Date: 24 September 2018
Subject: Report on the process for the appointment of the Chief Technology Officer¹

Introduction

- 1 On Friday 24 August 2018 the State Services Minister asked the State Services Commission (SSC) to consider the Chief Technology Officer (**CTO**) appointment process to ensure it had been robust, and whether a meeting between the Hon Clare Curran and Mr Handley had any improper bearing on the process or outcome.
- 2 As a result, on 29 August 2018 SSC instructed the Crown Law Office (**CLO**) to review the CTO recruitment process; in particular, as to whether a challenge on process grounds might be successful. CLO was also to consider whether the meeting between Ms Curran and Derek Handley, by the time of the request for advice the preferred candidate, had any effect on the process.
- 3 In the course of their review CLO spoke to Ms Curran, Ms Curran's former private secretary, and staff at the Department of Internal Affairs (**DIA**) and Ministry of Business, Innovation, and Employment (**MBIE**).

Crown Law's findings

In summary CLO's findings were:

- It was unlikely a challenge on the grounds of process would be successful.
- A lay observer, fully informed of the facts, would not reasonably suspect that Ms Curran was biased. That being the test for apparent bias. Furthermore, no pre-determination was evident.
- The evidence suggested a suitably robust recruitment process.
- Viewed objectively, the meeting between Ms Curran and Mr Handley before the appointment process commenced, did not prejudice the process.

Factual Background

- 4 Cabinet agreed to the creation of a Chief Technology Officer (CTO) role in December 2007. A first round of recruitment began on 19 December 2017. This round was not successful and on 12 February 2018 Ms Curran announced that no appointment had been made.

¹ This is a summary, pursuant to s 16(1)(e) of the Official Information Act 1982, of the contents of legally privileged advice provided to the State Services Commissioner by the Crown Law Office on 13 September 2018. Legal professional privilege is not waived in respect to the other information contained in the CLO opinion

- 5 After that announcement Ms Curran received a large number of enquiries, some enclosing CV's, about the CTO role. Those enquiries were forwarded to MBIE's Digital NZ team.
- 6 Ms Curran was also approached by various people at public events who shared their views of the CTO role and suggested candidates for the role. Ms Curran encouraged all interested parties to apply for the CTO role.
- 7 It was during this period, on 13 February 2018, that Mr Handley also contacted Ms Curran and arranged a meeting with her. Mr Handley wanted to discuss the CTO role and he expressed an interest in the role.
- 8 The meeting between Ms Curran and Mr Handley took place on 27 February 2018. The role of CTO was discussed and Ms Curran told Mr Handley that the recruitment process was on hold. She also suggested that he apply for the role.
- 9 After the meeting Mr Handley asked for details of how to apply for the role and Ms Curran sent him an email address that was being used by the MBIE Digital NZ team to receive expressions of interest. Ms Curran received enquiries from other potential applicants and they were also advised to apply in the same way.
- 10 The role was re-advertised in May 2018 with applications closing in June 2018. DIA and MBIE promoted the role domestically and internationally. At this stage, the candidates forwarded to MBIE's Digital NZ team were invited to apply.
- 11 In May 2018 Ms Curran met with the Chief Executive of the Department of Prime Minister and Cabinet (**DPMC**) to discuss the process that was taken when appointing the Chief Science Advisor. Ms Curran was also briefed by DIA, MBIE and a DPMC policy advisor about the appointment process. This is relevant as it supports the view that Ms Curran had not pre-determined the decision in favour of Mr Handley and was actively seeking to make the process robust.
- 12 Numerous applications were received. Ms Curran, the Chair of DEDI (**DEDI Chair**) and officials each independently composed long lists of candidates. Each of the long lists included Mr Handley. Ms Curran, the DEDI Chair and officials conferred and created a long list of the perceived best 18 applicants. Candidates were assessed by the then private secretary to Ms Curran against a criteria matrix consisting of mana, ability to influence, strategic ability and relevant experience.
- 13 The long-listed candidates were then asked to submit a video for consideration. The videos were reviewed using the same process as before: Ms Curran, the DEDI Chair and officials watched the videos and each created a short-list of candidates. Following discussions, those short-lists were combined into a short-list of seven candidates. Discussion between Ms Curran and the DEDI Chair led to an eighth candidate being added to the short-list. The added candidate was not Mr Handley but a person Ms Curran and officials saw as a "dark horse".
- 14 Of note is the fact that Mr Handley progressed through this process having been selected by Ms Curran and officials, and not Ms Curran alone. Further, Ms Curran and the DEDI Chair added a further candidate to the shortlist that was not Mr Handley. This counts against any suggestion Ms Curran was biased towards Mr Handley or that Ms Curran had pre-determined the appointment process in favour of Mr Handley.
- 15 Ms Curran and the DEDI Chair then agreed that the list was still too long to interview. The shortlisted candidates were asked to do a further video pitch. Out of the eight remaining candidates, four were selected for interviews using the same process that had been used to whittle the list of candidates from 18 to 8.

16 On 10 July 2018 the four remaining candidates were interviewed by Ms Curran, the DEDI Chair, an official from the Prime Minister's Office and the Government Chief Digital Officer. Two candidates were then selected to proceed through a due diligence process and capability testing. While there was discussion between the panel, there was no disagreement amongst panel members about the selected candidates.

17 Ms Curran wanted a comprehensive due diligence process which DIA was asked to undertake. Due diligence was conducted over the period 13 to 27 July 2018. The due diligence included:

- referee checks
- social media checks
- capability testing
- criminal convictions checking
- qualification checks
- media scenario testing

18 The due diligence was completed on the two finalists by Jackson-Stone and Cerno. Jackson-Stone are recruitment consultants. Their work included criminal, credit and qualification checks. It also included a social media scan. In respect of Mr Handley their work also included checks in the United States, where Mr Handley was based.

19 The capability assessment was conducted by Cerno. Cerno provide psychological assessments that, according to their web-site, provide insights into the "strengths and developmental needs" of candidates so that effective selection decisions can be made.

20 On 30 July the interview panel met again and reviewed the results of the due diligence exercise. The due diligence exercise did not favour either candidate over the other. The interview panel decided to ask further questions of the final candidates before they came to a final conclusion. Ms Curran asked these questions of the candidates over the phone. After Ms Curran reported back on the candidates' answers to the questions, the interview panel unanimously agreed that they wanted to appoint Mr Handley.

21 In early August Mr Handley was informed he was the preferred candidate.

22 The process of negotiating a contract with Mr Handley commenced. After some general discussions with Mr Handley Ms Curran delegated this task to officials at DIA.

23 On 20 August 2018 the Cabinet approved the appointment of Mr Handley subject to the successful resolution of conflicts of interests.

24 By 20 August 2018 the negotiations on the terms and conditions for the appointment of Mr Handley as CTO were drawing to a close, including general agreement on the terms of the proposed contract. On the evening of 20 August 2018 the Chief Legal Advisor at DIA emailed Mr Handley with a copy of the letter of appointment and the contract for services. The letter of appointment stated that the appointment had been temporarily approved and was contingent on:

- matters raised by Cabinet relating to the perception of conflicts of interests; and
- a risk mitigation plan on conflicts of interest being agreed to; and

- Mr Handley obtaining and retaining a confidential security clearance.

- 25 Later that evening (early morning New York time where Mr Handley was the based) Mr Handley emailed back saying: "Thank you — I am happy with those versions. Should I be signing them or waiting for the final documents from Ms Curran."
- 26 On 25 August 2018 the acting Chief Executive of DIA emailed Mr Handley. The email included that there had been some change to Ms Curran's portfolios but that the appointment process was still moving ahead.

Reasoning

- 27 CLO considers, for the reasons that follow, it is unlikely that the appointment of the CTO would give rise to a successful legal challenge.
- 28 There were no grounds for a claim in contract. In particular, there was no suggestion of any misinformation about the nature of the position or of its existence. Nor was there conduct that could constitute unlawful discrimination under the Human Rights Act 1993.
- 29 Because the power being exercised was not statutory, but merely the Crown's ordinary power to enter into contracts, the risk of any administrative law challenge was limited. Absent evidence of corruption, fraud or bad faith, of which none was identified, the Courts will not interfere with a Government contracting process.
- 30 There was no evidence of bias or pre-determination.
- 31 Ms Curran's meeting with Mr Handley on 27 February 2018 did not breach a legitimate expectation or undermine the recruitment process.
- 32 That is because the meeting occurred before the recruitment process started in May 2018. Such a pre-meeting is not problematic unless it could be seen as creating an unfair advantage or to pre-determine the eventual outcome. Neither of those concerns arise given:
- All Ms Curran did was to discuss the role, the ambit of which was still to be finalised, and suggest to Mr Handley that he apply.
 - Mr Handley was not selected in a vacuum. The process occurred with the assistance of officials and contracted experts.
 - The long-list of candidates was created by Ms Curran, the DEDI chair and officials. All three selected Mr Handley for inclusion on the long list.
 - The short-list was compiled in the same way as the long-list. Ms Curran and the DEDI chair added a name to the short list that was not Mr Handley.
 - An interview panel of four, including Ms Curran, selected two candidates for the short-list. Those two candidates, one of whom was Mr Handley, were then submitted to an extensive due diligence exercise.
 - The due diligence exercise was carried out by independent contractors.
 - There was consensus amongst the panel that Mr Handley should be selected.
- 33 Viewed objectively, the meeting with Mr Handley before the recruitment process commenced did not prejudice the process such that another candidate or any other person would have an administrative law cause of action.

- 34 While the failure to record the meeting was unfortunate, it did not undermine the fact that a careful process was followed. There was no evidence of bias or predetermination.
- 35 CLO also looked into a disclosed professional relationship between Mr Handley and the DEDI chair. CLO determined the relationship was one of “friendly professional acquaintance” and unsurprising given the DEDI chair’s involvement in the tech industry and knowledge of most of the New Zealand tech entrepreneurs. The DEDI chair was selected for the panel on the basis of her knowledge. As a result, there was insufficient apparent bias to invalidate the appointment process.
- 36 In any event, even if there had been apparent bias, such bias would have been unlikely to invalidate the CTO appointment process. Given the significant prejudice to Mr Handley if his contract was to be invalidated a court would be unlikely to set a contract aside on the basis of an administrative law cause of action. The disclosure of the relationship also counts against a court granting relief.
- 37 Finally, now that the contract has been ended, any application on judicial review would be moot.

PROACTIVELY RELEASED BY THE MINISTER OF STATE SERVICES